SUPREME COURT, U. S.

AUG 7 1967

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 464

PAUL BIAZEVICH, DINKO BIAZEVICH, and JERRY KUSAR, d/b/a M. V. LIBERATOR; JOHN GARGAS, NICK GARGAS, JOHN I. (JACK) GARGAS and NICK ANDRICH, JR., d/b/a M. V. CITY OF LOS ANGELES; VINCENT BUDROVICH and WESTERN BOATBUILDING COMPANY, d/b/a M. V. DELORES M.; JOHN CVITANICH and TOM MASON, d/b/a M. V. SEA KING; STEVE GARGAS, ANITA GARGAS, FRANCIS TRUTTA, MATE TRUTTA and FRANK S. GARGAS, d/b/a M. V. COLUMBIA; NICK MARINCOVICH and SOUTH COAST FISHERIES, d/b/a M. V. NEW SEA ROVER; NORMAN MEZIN and WESTERN BOATBUILDING COMPANY, d/b/a M. V. WESTERN FISHER; ANDREW RAFKIN, JR., MATT DRAGICH, PETER DRAGICH and FRANK KOSTRENCICH, d/b/a M. V. SEA SCOUT; PETER SESTICH, DOMINIC PICINICH, NICK MOSICH, GLORIA WALL and MILES GRADES, d/b/a M. V. ARLENE S.; JOHN STANOVICH, NICKOLAS STANOVICH, CARL A. LARSEN and FRENCH SARDINE COMPANY, d/b/a M. V. GOLDEN WEST; JOHN MISETICH, DOMINICK MISETICH, JAKOV MISETICH, MARTIN TARABOCHIA, ANTON KARMEN MISETICH, CHARLES A. CUREVICH and MATHIE D. CUREVICH, d/b/a M. V. RONNIE M.; JOHN ZOROTOVICH, PHILIP MLADINEO, MARTIN MONAS, ANTON MISETICH, IVAN MISETICH, and DOMINICK MISETICH, d/b/a M. V. DEFENSE; JOHN K. VILICICH, ADMINISTRATOR OF THE ESTATE OF ANDREW VILICICH, DECEASED, d/b/a M. V. MARSHA ANN; AMERICAN TUNA COMMITTEE; and SEINE AND LINE FISHERMEN'S UNION OF LOS ANGELES HARBOR AREA, SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioners,

and

SEINE AND LINE FISHERMEN'S UNION OF SAN PEDRO, affiliated with SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioners,

and

SEINE AND LINE FISHERMEN'S UNION OF SAN PEDRO, affiliated with SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of

Appeals for the Ninth Circuit which, on January 6, 1967, rendered a decree enforcing an Order of the National Labor Relations Board of March 2, 1962. On January 30, 1967 Petitioners filed their motion for extension of time to file their petition for rehearing, and within the appropriate time, to wit, on or about February 21, 1967, Petitioners petitioned the Court for re-hearing. Said Petition was denied on May 9, 1967.

The Court created a novel three part test of first impression which aggrieved parties must meet in order to obtain relief from errors heretofore deemed prejudical on their face, and enforced the order of the Board. It did not discuss the multitude of substantive questions presented, except to rely upon the Trial Examiner's and the Board's findings.

OPINIONS BELOW

The opinion and order of the Court of Appeals for the Ninth Circuit, reported at 374 F.2d 974 (9th Cir. 1967), appear in Appendix "A".

The Board's decision and order in case No. 19,228 below (R. 711-787, 976-1002) relating to your petitioning boatowners are reported at 136 NLRB 13 appearing at Appendix B). The Board's decision and order in case No. 19,227 (R. 188-802, 1073-1109), relating to your petitioning Seine and Line Fishermen's Union of Los Angeles Harbor, Seafarers' International Union of North America, AFL-CIO (herein called Seine and Line) are reported at 136 NLRB 1 appearing at Appendix C.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Ninth Circuit enforcing the decree of the National Labor Relations Board was entered on January 6, 1967. The period within which to file this Petition was extended by the Petitioners filing of their Petition for re-hearing which was denied on May 9, 1967. The jurisdiction of this Court is envoked under 29 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether, Petitioners have been denied due process of law by way of the application of an impossible test of prejudice which the Court of Appeals created in the instant case.

2. Whether, the order of the N.L.R.B. should be enforced even though the attorneys for the General Counsel applied the incorrect test in determining which pre-hearing statements of their witnesses were made available to Petitioners.

3. Whether, the order of the N.L.R.B. should be enforced even though the Trial Examiner erroneously refused to personally examine certain memoranda to determine whether they should be made available to Petitioners for purposes of cross-examination of the Board witnesses, and even though the Trial Examiner erroneously revoked subpoenas *duces tecum* and *ad testificandum* properly served upon Board employees, preventing Petitioners from full and complete cross-examination of the Board's witnesses.

4. Whether, the N.L.R.B.'s finding with respect to the purported violation of Section 8(a)(3) of the Act is directly contrary to this Court's holding in *American Ship Building Co. v. N.L.R.B.* 380 U. S. 360 (1965).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, appear at Appendix D.

STATEMENT

I.

A FACTUAL REVIEW OF THE PROCEDURAL IRREGULARITIES OF THE PROCEEDINGS BELOW.

A. The Charges Brought by the Complaining Union and the Complaints Against the Boatowner Petitioners.

On January 13, 1956, the ILWU Local 33 filed charges against the boatowner Petitioners (Respondents below) affiliated with the American Tuna Committee (ATC), which charges were amended in various instances on February 13, June 26 and October 25, 1956. [R. 6-141.] These charges alleged that striking members of Local 33 were discharged in violation of the National Labor Relations Act and sought to reinstate the strikers who at that time had been replaced by other non-striking fishermen, and attacked the validity of the existing AFL-CIO contract covering crews on the American Tuna Committee fishing vessels.

On November 20, 1956, a consolidated complaint issued under Sections 8(a)(1), (2) and (3) and 8(b)(1)(A) and (2) of the National Labor Relations Act against the boatowner Petitioners and the Seine and Line Union AFL-CIO, Petitioners. No complaint was issued under Section 8(a)(5), urging that petitioning boatowners were refusing to bargain in good faith. [NLRB Case No. 21-CA-2380 through 21-CA-2402 and 21-CB-772.]

Prior to the issuance of this complaint, on June 5, 1956, a representation petition was filed by Local 33, ILWU, involving the parties to this action. The Board in that case, *Matter of Krist Gradis,* 121 NLRB 601 (1958) (the record of which has been incorporated within the instant record [R. 1042-1229]), had before it much of the same documentary evidence as is involved in this case. On August 19, 1958, the Board ordered an election and held that the members of the ATC constituted a clearly appropriate multi-employer unit and that the Petitioners ATC boatowners' termination of their 1955 agreement with Local 33 was not "untimely". [121 NLRB 601, 607, n. 17; R. 1169, n. 16.] A representation election was held on October 20, 1958. Petitioner Seine and Line Union was victorious and was certified on October 28, 1958 as the proper collective bargaining representative in the American Tuna Committee unit. [R. 1229-1236.]

B. The Pertinent Facts Relating to the Proceedings in the Initial Hearing.

On August 5, 1957, almost two years after the events that served as the basis of the complaint herein, the hear-

ing below was opened. On September 3, 1957, the Trial Examiner, Wallace E. Royster, began taking the testimony of the first of approximately seventy witnesses of the General Counsel who rested his case in chief on November 19, 1957. [Tr. 2394.]

1. **The Attorney for the General Counsel Refused to Produce Witnesses' Pretrial Statements.**

On September 3, 1957, after demand by the respective counsel for ATC and Seine and Line, the attorney for the General Counsel refused to produce the signed pre-hearing statements and Board questionnaire [ATC Ex. 1] of witness Ferdinand Granich of the DEFENSE although the documents directly related to his direct examination. The sole basis for the refusal to produce was the Rules and Regulations of the Board. [Tr. 154.] No valid privilege whatsoever was asserted. [Tr. 147-154.] Despite this refusal, the Trial Examiner rejected the insistent arguments of counsel for Petitioners and refused to direct the attorney for the General Counsel to produce any pre-hearing statements or answers to questionnaires given by witness Granich to Board Agent, Karl W. Filter, the Field Examiner assigned to these cases. [Tr. 155-156, 191.]

On September 4, 1957, the attorney for the General Counsel, again without asserting any privilege, absolutely refused to state whether or not his files contained any pre-hearing affidavit, questionnaire or other written signed statement obtained by Karl W. Filter or any other Board Agent [Tr. 328-329], relating to the subject matters testified to by witness George J. Bush of the DEFENSE. [Tr. 728-729.] On September 5, 1957, the

attorney for the General Counsel similarly and without privilege refused to identify or produce any pre-hearing statement in his files on witness John Dragich of the SEA SCOUT and all other witnesses thereafter called by and on behalf of the General Counsel. [Tr. 381.]

2. **The Trial Examiner Refused to Require Counsel for the Charging Union to Produce Pretrial Statements in His Possession.**

Upon the examination of Ferdinand Granich, it developed that the witness had made a written statement which he signed and gave to Karl W. Filter. [Tr. 154.] When the General Counsel refused to produce the statement, counsel for Petitioner requested that Counsel for the charging union supply him with a copy. He responded that he would not do so unless ordered. The Trial Examiner denied Petitioner's Motion to Produce. [Tr. 155.]

3. **The General Counsel Refused to Consent to the Inspection of Certain Documents.**

On September 18, 1957, Counsel for Petitioners served upon the Trial Examiner, Counsel for the General Counsel, and Counsel for all other parties, the Request for the General Counsel's Consent to Inspect Certain Documents. [ATC Ex. 16-A, R. 396, Tr. 2415-2417.] Therein Counsel sought, pursuant to Section 102.87 of the Rules and Regulations of the National Labor Relations Board, to inspect certain documents named therein, including:

(a) All affidavits and other statements in writing made to any Board agent by any witness who had testified

on behalf of the General Counsel in these proceedings, provided that such documents contained statements of the witness relating to the facts, events and matters upon which said witness testified herein;

(b) All questionnaires in the form of ATC 1 filled out by the witnesses who have testified on behalf of the General Counsel in these proceedings;

(c) All memoranda in the General Counsel's files relating to reports from the said witnesses or conversations with said witnesses by Board agents relative to the facts, events and matters about which said witnesses testified herein;

(d) All affidavits and statements signed by persons who have appeared as witnesses for the General Counsel relating to the facts, events and matters upon which said witnesses have testified herein, which documents have been filed with the Regional Office of the Board in support of the charges upon which the within complaint was based;

(e) All letters or other documents from witnesses who have testified on behalf of the General Counsel herein, written to any Board agent, or bearing upon the facts, events and matters upon which the witnesses testified in each proceeding. [ATC Ex. 16-A, R. 402-403.]

On October 4, 1957, the General Counsel denied the request of Petitioner *without asserting any privilege whatsoever*. [ATC. Ex. 16-B; R. 406.]

4. The Agent-Employees of Petitioner Refused to Respond to Validly Issued Subpoenas.

On November 20, 1957, Petitioners served upon the Regional Director, Henry W. Becker, the attorney for the General Counsel, George O'Brien, and the Field Examiner, Karl W. Filter, duly issued *subpoenas duces tecum* which ordered the agents of the Board to appear and testify before the Trial Examiner on November 27, 1957 and produce pre-hearing affidavits, questionnaires, memoranda of Board agents, and letters of some 71 witnesses. [ATC EX. 20, 21, 22; R. 407-429.] Petitions to revoke the subpoenas [G. C. 72-A, B.C. "Motion to Quash" R. 430-432], were denied by the Trial Examiner on December 4, 1957. [Tr. 3316.]

On the continued return date, December 4, 1957, the Agents refused to comply with the subpoenas and refused to testify or produce the documents although they were actually in their possession either in the hearing room or in Mr. O'Brien's Office next door to the hearing room. At no time did any of the agent-employees assert any privilege whatsoever. [Tr. 3011-3012; Tr. 3136; Tr. 3318-3333.]

5. Petitioners Sought to Keep the Hearing Open to Afford an Opportunity to Enforce Subpoenas and to Examine the Propriety of the Proceedings.

The hearing of February 7, 1958, after adjournment from the hearing of January 27, 1958, was pursuant to a telegram of the Trial Examiner, which gave notice that the hearing was to be closed. [Tr. 4165.] Counsel for Petitioners represented that he was filing an application

in the District Court for the enforcement of the subpoenas, and requested that the hearing be held open pending that Court's decision. [Tr. 4158-4160.]

The Trial Examiner issued, at the request of Counsel for your petitioning union three *subpoenas duces tecum* and three *subpoenas ad testificandum* which were to be served upon Becker, O'Brien and Filter. He also issued three subpoenas to Counsel for the petitioning boatowners directed to the same three persons, each of which subpoenas were returnable at 4:00 P.M., Monday, February 17th. [Tr. 4194-4195.]

At the hearing on February 17, 1958, the Trial Examiner considered petitions to revoke the subpoenas filed by the General Counsel, which were not served upon the responding parties until the opening of the hearing. On March 4, 1958, the Trial Examiner revoked the subpoenas. [G.C. Ex. 4, R. 613-614.]

6. The Field Examiner, Karl W. Filter, Passed Away.

During the recess between February 27, 1958 and July 9, 1958, the Field Examiner, Karl W. Filter, passed away. [Tr. 4223.]

7. The Hearing Was Closed.

On July 9, 1958, the Trial Examiner closed the hearing [Tr. 4256-4257], over the objection to your Petitioners who urged that the hearing be held open or continued to allow the Court of Appeals for the Ninth Circuit to rule on an application for temporary restraining order and injunction which would have required the Trial Examiner to keep the hearing open until the appeal of

Biazevich v. Becker was concluded. Despite the importance of the enforcement of the subpoenas which was being sought by the Respondents, the hearing was closed. [Tr. 4256-4257.]

C. The Pertinent Facts Relating to the Proceedings in the Perfunctory Reopened Hearing.

1. The Hearing was Belatedly Reopened in an Ineffective Attempt to Cure the Admittedly Error-Ridden Original Hearing.

On September 8, 1958, the Trial Examiner reopened the record in response to *Ra-Rich Manufacturing Corporation*, 121 NLRB No. 90, decided on August 28, 1958, and he reversed "any ruling made at the hearing denying the request of any Respondent for production of pretrial statements." [T.E. Ex. 1; R. 632, 633.] On November 4, 1958, the Trial Examiner granted the formal motions of Petitioners to reopen the hearing. [Tr. 4294.] Included within that order was the direction that General Counsel produce *each and all* of his witnesses for further cross-examination at the reopened hearing. [R. 639, 644.]

2. The General Counsel Refused to Produce Statements of Witnesses, Unless They Were Signed by the Witness.

Despite the Trial Examiner's ruling, the attorney for the General Counsel refused or failed to produce any statements in the possession of the Board except those which were "signed statements" in the possession of the

Board. [Tr. 5122.] The Trial Examiner did not require the production of statements made by some 33 witnesses who testified which may have been otherwise producible under applicable federal law. [Tr. 5127, 5129, 4371-4373, 4640, 4674-4678, 4952-4958, 4461-4466, 4512, 4686, 4691, 4794-4795; 4577-4589, 4639-4640, 4787-4788, 4511-4512, 5107, 5049-5050, 4950-4951, 4826-4827, 4831, 4832, 5099, 5016, 5017.] Many statements in the possession of Counsel for the charging union were not produced upon proper demand. [Tr. 5128, 4433-4435, 5049, 5050, 5099, 5025, 5026.]

3. The Filter Memoranda Were Discovered by the Attorney for the General Counsel but Were Not Examined by the Trial Examiner nor Produced for Cross-examination.

On November 4, 1958, Mr. O'Brien advised the Trial Examiner that he had found three notebooks of the deceased Board Agent, Karl W. Filter. In one of those notebooks there were some undated notes which related to witnesses' pretrial statements made in conference with Filter. Despite being urged to examine the documents *in camera* to determine whether they were such as should be presented to the Respondents' Counsel, the Trial Examiner refused. [Tr. 4834-4835.]

The ruling applied to statements made by all other witnesses. [See e.g., Tr. 4822-4837, Tr. 5016, 5017, Jerry J. Marinkovich; Tr. 4890-4891, Ferdinand Granich; Tr. 4952-4960, G. C. Ex. 74-A, B, and C, Sreko Matura; Tr. 1771-1733, John Rukavina.]

4. The General Counsel Refused to Consent to Have Board Agents Testify or Produce Documents in their Possession.

On December 16, 1956, Counsel for Petitioners sought the consent of the General Counsel for the production of Board employees' memoranda, memo pads, appointment books and so forth, relative to the examination of witnesses before trial, and to the testimony of Kennedy and O'Brien. [ATC Ex. 36; R. 651.] On the same day duly issued *subpoenas duces tecum and ad testificandum* were served upon Kennedy and O'Brien. [ATC Ex. 37, 38; R. 664-673.]

On December 19, 1958, the General Counsel for the Petitioner denied consent to have Kennedy and O'Brien produce documents or testify in the matter, without asserting any proper basis whatsoever. [ATC Ex. 40, R. 663.]

5. The Outstanding Subpoenas Served Upon the Board Agents Were Revoked by the Trial Examiner.

On December 19, 1958, Messrs. O'Brien and Kennedy filed their petitions to revoke the previously issued *subpoenas duces tecum and ad testificandum*. [ATC Ex. 41-44; R. 676-683.] On December 22nd, the Trial Examiner revoked the *subpoenas duces tecum and ad testificandum* "for the reasons given in the Petition to Revoke." [Tr. 5045.] These Petitions assert:

> "1. Under Section 102.95 of the Rules and Regulations of the National Labor Relations Board, Petitioner, who is an employee of the Board, is forbidden to disclose, with certain exceptions, official

information without the prior written consent of the General Counsel.

"2. The subpoenaed documents are official Board papers, not within the exceptions and the General Counsel has withheld the consent requisite for their disclosure.

"3. The evidence sought is privileged against disclosure by this rule." [R. 676-677, 678-679, 680-681, 682-683.]

Thus, upon the sole basis of the Board rule, the subpoenas were revoked.

6. **The General Counsel Failed to Produce Fourteen Witnesses Who Had Appeared at the Original Hearing.**

Despite the order of the Trial Examiner that the General Counsel produce each and all of his witnesses for further cross-examination [R. 639, 644], he failed to do so. No subpoenas were sought by the General Counsel to secure the attendance of the witnesses. [Tr. 5124.]

7. **The Trial Examiner Issued Subpoenas to Require the Attendance of Ten Absent Witnesses.**

Thereafter, on January 5, 1959, upon written application by Petitioners for *subpoenas ad testificandum* requiring the attendance and testimony of ten witnesses for the General Counsel who had failed to appear for further cross-examination, at the hearing on the morning of January 12, 1959, the Trial Examiner issued the subpoenas. [Tr. 5191-5193.]

8. **The Reopened Hearing Was Closed Even Though It Rendered the Subpoenas Useless.**

Immediately after issuing the subpoenas, referred to in Section 8, the Trial Examiner granted the General Counsel's motion to close the hearing, saying:

> "Well, if I were to close the hearing it would be in anticipation there would be no subsequent reopening." [Tr. 5183.]
>
> * * *
>
> "To close the hearing now is to give you subpoenas without permitting them to be any use to you." [Tr. 5193.] [See Tr. 5174-5193.]

On this note, the Hearing was closed. [Tr. 5194.]

II

A FACTUAL REVIEW OF THE SUBSTANTIVE ISSUES.

A. The Background to this Dispute Between the Fishermen and the Boatowners.

The San Pedro Harbor is made up of a community of Yugoslav, Oriental and Italian fishermen. Traditionally, ILWU Local 33 has consisted of the Yugoslav fishermen, and the Seine and Line Union consisted of the mixed Italian-Oriental fishermen. [R. 721, 1166.] The employer boats that are involved here for years and years have been owned and worked by fishermen belonging to the Local 33 Union. [R. 1166, 2474-2475, 3880-3882, 1472-1473, 3138-3139, 3945-3946, 3052-3055, 2897-2898.]

The Petitioner boatowners are members of 13 partnerships each of which operated a fishing vessel out of San Pedro Harbor, California. In early 1955, the fishermen employed on all of these vessels belonged to Local 33 which had executed its standard collective bargaining agreement with the boatowners. [R. 719; G. C. Ex. 33-35, Tr. 1979, 2001, 2010.] Under this agreement the crew was to receive a minimum guarantee per ton even though the price paid for the fish by the canneries fell below the guarantee. [R. 710; G. C. Ex. 33-34, Tr. 1979, 2001, 2132-2143.] In 1954-1955 the price paid by canneries for tuna declined drastically due to an influx of Japanese tuna boats. [R. 719; Tr. 2017.]

B. The Union Waived the Minimum Price Provisions.

In 1954, the members of Local 33 waived the minimum guarantee provision of their contract and were paid on the basis of a percentage of the gross catch. In late 1954, the skippers and boatowners were told by Sokolich, the Local 33 secretary, "Well, we did it in '54, . . . we'll do it again." [Tr. 2502, see 3241-3243.] They were told in 1955 by Marinkovich, an official of Local 33, that if they signed the minimum guarantee provision in the new contract and there was a further price drop ". . . we are not going to stick you with it." [Tr. 3062.] In accordance with this understanding Local 33 waived the minimum guarantee at least twice in 1955. [Tr. 2010, 2096, 2130-2143, 2096.] Despite these statements, the understanding, and the waivers, the Union reversed itself and refused to abide by the previous understanding. [Tr. 3539-3542.] It advised the skippers that the members of Local 33 would not fish for less than the minimum guarantee con-

tained in their contract. [R. 721.] The skippers of these fishing boats, which then belonged to a Fishermen's Cooperative, told the fishermen that they couldn't pay the guaranteed minimum, since in fact the guaranteed minimum was "substantially in excess of (the price) at which the catch could be sold." [R. 719.] In July and August of 1955, Sokolich said there was no use trying to settle the matter by discussions. [Tr. 3539.] Since the boatowners, through the Cooperative, had negotiated a contract which would not terminate until December, 1955, and all or substantially all of its fishermen were Local 33 members, the boatowners had no choice but to tie up the boats until such time as either the price of tuna offered by the cannery exceeded the minimum guarantee which the fishermen were demanding, or until such time as the fishermen would agree to fish for less than the cannery price. [Tr. 2907-2910, 3575-3576, 3960, 3143-3144, 2510, 2413.] It goes without saying that it was economically impossible to promise the fishermen a minimum guarantee of $310.00 a ton, and only receive $270.00 a ton from the cannery. [G. C. 43; Tr. 3668-3669.]

C. The Refusal of the Crew to Work Caused the Boats to Be Tied Up.

Thereafter, the fishing boats that the members of Local 33 had been working on were tied up in San Pedro Harbor. In July or August, members of Local 33 resolved that they would not fish except at the higher price and *no further meetings of the Union would be held to reconsider the question.* [Tr. 3576.] Since the tuna prices did not rise and the Union did not change its position with respect to meeting to reconsider the question of whether

it would fish for less than the minimum price, the boats remained tied up through the end of 1955. As far as the boatowners knew, the Union had taken the position that it would not fish at anything less than the minimum guaranteed price in the contract. The Union held out no hope of further negotiations on the question. As far as the boatowners knew, the previously available alternative of having the Union change its mind with regard to fishing at the prevailing fish prices no longer existed. At this point, the parties had reached an impasse; Local 33 was adamant — it would not fish for less than a guaranteed minimum, which was below the prevailing market for tuna; the boatowners and skippers could not keep their boats tied up until the price of tuna climbed above the minimum guarantee insisted upon by Local 33, since fishing was their livelihood.

D. The Boatowners Had Only One Alternative as a Source of Crew Members.

It was a matter of common knowledge that if a fisherman in San Pedro didn't belong to Local 33, he belonged to the Seine and Line Union, since both Unions had contracts with virtually the same Union security provisions and all fishermen belonged to one Union or the other. [R. 721; Tr. 106, 2158-2159.] So in trying to convince his fishermen friends and crew members to come fishing in 1956, the skipper discussed with the fishermen the ways that they could go fishing. The only apparent available way was to hire fishermen who would fish without a minimum guarantee. It was a fact of life that the only source of fishermen other than Local 33 was Seine and Line, and those fishermen did not insist upon a

guaranteed minimum. Sometime in July and August, the boatowners talked with their crew members and said things like, "We want to go fishing. If Local 33 continues in its adamant position with respect to the minimum guarantee we will not be able to fish together because it is economically impossible for me to guarantee the minimum contract price." In no way was this meant as a threat or coercion, but a mere discussion between fishermen about the facts of life in San Pedro Harbor.

E. The Contracts with Local 33 were Timely Terminated.

Since it was impossible to fish under the current collective bargaining agreement with Local 33, Rafkin, the skipper of the SEA SCOUT, properly filed a termination notice with Local 33. [G. C. Ex. 51.] The Union responded with a notice to its members that it was receiving termination notices from various boatowners and posted a notice asking, without any basis whatsoever, whether the fishermen wanted to continue working with such skippers, since the fishermen "were going to be fired at the end of the year." These notices were posted in the union hall and on the dock in San Pedro. [G. C. Ex. 51; ATC Ex. 7; Tr. 2102-2103, 2010-2012.] Except as to Nick Gargas, none of the boatowners was alleged by the complaining witnesses to have threatened to discharge them. [ATC Ex. 7; Tr. 2102-2103.] Even that allegation was proven to be unfounded.

The rest of the boatowners involved here decided to pull out of the Cooperative and form their own bargaining agency. They contacted Mr. Carl Gould, who as-

sisted them in the formation of the American Tuna Committee and the Committee gave Gould the power to bargain for them as a multi-employer unit. [G. C. Ex. 48; G. C. Ex. 49.] Thereafter, the agreements with Local 33 were timely terminated on October 26, 1955. [R. 720; G. C. Ex. 48, *Krist Gradis,* 121 NLRB 601, 607, n. 17.] Upon receipt of this notice, Local 33 added the various names of the skippers of American Tuna Committee to the notice it had posted when Rafkin filed his termination. On all of these notices, the statement that the fishermen were going to be fired was repeated in bold caps. [ATC Ex. 7.]

F. Local 33 Refused to Bargain with ATC Boatowners.

Throughout this period, the Union refused to recognize ATC as the proper bargaining unit for the 14 boats. In fact, even as late as December 14, 1955, the Union sent a letter to attorney Gould that said that none of the boatowners which purported to belong to the American Tuna Committee had withdrawn from the Fishermen's Co-op and the original contract with those boatowners still existed and was automatically renewed since it was not properly terminated. [G. C. Ex. 52.] Thus, even at this date, the Union refused to bargain with ATC.

Between December 15 and 20, the Union sent letters to its members stating that the boats that belonged to the ATC wouldn't have contracts on them for the new year and that the Union must make plans for picketing and other action. [ATC Ex. 8; Tr. 1498-1501.] This notice was posted around the dock and all of the community knew that the notices had gone out to the Union members.

On or about December 22, 1955, John Marinkovich, an official of Local 33, came to the COLUMBIA carrying picket signs. [Tr. 795-796, 3177-3180.]

About this time, the skipper of the SEA KING wanted to have some of his fishermen start with him on the new season fishing. His crew told him that the Union wouldn't let anyone fish on ATC boats. [Tr. 3614-3618, 3620, 773, 1948-1952, 3620-3621.] The Union consistently maintained this position and, at a meeting on December 26, 1955, resolved that it not change its persistent position. [G. C. Ex. 49.] And again on December 27, 1955, the Union secretary reiterated that the Union "stay at its same position." [G. C. Ex. 60.] On that same day, the Union ordered its members to picket on that day.

G. The Boatowners Necessarily Notified Their Striking Crew Members to Remove Their Clothes From the Boats.

Thereafter, in light of the continued work stoppage from July-August and in light of the continuing adamant position of the Union as exemplified by the current picketing which was further evidence of the strike attitude of the Union, it was obvious that the skippers would not be able to rehire their former fishermen for the next season.

To avoid having to share the catch with a fisherman who wouldn't fish, but who might argue that he was rehired for the 1956 season because he left his clothes on the boat, and to make a place for someone who would fish, Attorney Gould advised that each member of the ATC send a letter to each crew member to the effect that

in light of the Union's present unalterable position with regard to not fishing at the prevailing prices, the shipowner did not know whether the crew members would be fishing with the boat in January. [R. 722.] To avoid any misunderstanding, on or about December 27, 1955, the owners wanted the crew members to take their personal belongings off the boat. [G. C. Ex. 5.] None of the boatowners treated the notices as discharges. [Tr. 1071, 1245, 1046, 2541, 1831, 1839, 1835, 2439, 2540, 2537-2538, 2645-2648, 2545, 1922, 4992, 4562, 4563, 3409-3410, 3260, 364-365, 474-475, 442-443, 3386-3387, 3385, 3289, 3726-3727, 3618-3620, 3636, 3710, 4317, 4318, 3971, 942, 960-961, 3989-3991, 4032-4033, 4035-4036, 3992-3994, 4047-4050.] Rather, they sent them on the advice of their attorney to avoid the possible effect of *Vitco v. Joncich,* 130 F. Supp. 945 (S. D. Cal. 1955), which could have been interpreted as authority for requiring the owners to pay for the crew members whether they were going to fish or not, if their clothes remained aboard from one season to another. [Tr. 2470, G. C. Ex. 33, 2538-2539, 2602-2606, 3257-3259, 3660, 3661, 2718-2719.]

H. The Boatowners Hired the Only Skilled Fishermen Available.

By this time the beginning of the fishing season was upon the boatowners. They had to move fast. They tried to find skilled fishermen who would fish on their boats. Of course, the members of Local 33 would not fish on their boats, because of the resolution which the Union had adopted on November 4, 1955, to the effect that anyone who fished on such a boat would be branded

as a fink [Tr. 2213-2216], which is understood to mean "strike breaker," a man working behind a picket line, or someone that was assisting to break a strike. [Tr. 2207.] Many of the members were afraid of retribution in the event they did fish on an ATC boat. [Tr. 3614-3621, 773, 1948-1952.] So the only other source for skilled labor was through the Seine and Line Union. [Tr. 106, 2158-2159.]

After hiring their crews, John Calise, secretary of the Seine and Line, claimed a majority on the ATC boats and demanded the boatowners bargain with his Union. [R. 724, Tr. 3965-3967, 4043-4044, 2606-2609.] After a card check revealed that a majority of the fishermen employed by the ATC bargaining unit did belong to Seine and Line, Gould told Calise that he would negotiate with him with respect to a contract for the forthcoming tuna season. [R. 727.] After negotiating, on January 3-4, the contract was signed by boatowners of ATC and by Calise for Seine and Line. [Tr. 3661-3664, G. C. Ex. 66, 2556, 2560-2694.]

III

PERTINENT FACTS RELATING TO THE PROCEEDINGS BEFORE THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

The Board sought a decree of enforcement of its order in the Court of Appeals.

On November 30, 1965 this matter was orally argued before the Circuit Court. On January 6, 1967, the Court rendered its decision, in essence enforcing the order pre-

viously issued by the NLRB. After appropriate extension of time to file Petition for Re Hearing, Petitioners submitted such Petition, which Petition was denied on May 9, 1967.

The Court of Appeals for the Ninth Circuit held that its scope of review was limited and the question before it was not whether the conclusions drawn by the Board were right, but whether they were reasonable, citing 4 Davis Administrative Law, § 29.06 at 143 (1958). It then found that all of the conclusions and findings of the Board were supported by substantial evidence considering the record as a whole, and although different inferences might have been drawn from the facts the Board's construction of the events was reasonable and proper.

The Court then examined the inherent procedural irregularities that were alleged by Petitioners and found that the Trial Examiner erred in revoking the *subpeona duces tecum and ad testificandum* served upon Board employees, when the Trial Examiner relied solely on Board Rule 102.118. The Court further found that the Trial Examiner erred in refusing to examine certain notes of a Board employee to determine whether they met the substantially verbatim test of *Williams v. U.S.*, 328 F.2d 178 (D.C. Cir. 1963) and the Court found specifically that the reliance of the Trial Examiner on the representations of the General Counsel and his refusal to examine the documents when urged to do so was in error. *United States v. Kieg*, 320 F.2d 634 (7th Cir. 1963).

However, despite the admitted errors, the Court of Appeals for the Ninth Circuit found that the errors were not sufficiently grave to deny enforcement, since your

Petitioners did not, according to the Court, make a sufficient showing of prejudice as a result of such errors.

The Court of Appeals for the Ninth Circut adopted a novel test of first impression regarding the burden an aggrieved party must meet to establish prejudice from procedural errors that heretofore were considered prejudicial on their face:

> "It would be necessary first, that the inspection of the Filter memoranda and the enforcement of the subpoenas would have actually unearthed hitherto undisclosed statements; second, that by means of cross-examination based on these statements the testimony of several witnesses would have been successfully impeached; and third, that the Board, in light of this impeached testimony, would have made different findings."

Thus, there is squarely presented the question of whether in proceedings before the National Labor Relations Board, and presumably any other administrative board, it is necessary for parties who have admittedly not been accorded proper procedural safeguards to meet the test outlined by the Court of Appeals for the Ninth Circuit before relief from those errors can be cured.

REASONS FOR GRANTING THE WRIT

1. This case creates a grave conflict of opinion in the Federal Courts of Appeals in that the Court of Appeals for the Ninth Circuit has created a test of prejudice which places it in conflict with the Court of Appeals for the Second Circuit which has held the refusal to order production of documents by the Trial Examiner, "constituted error that could not have failed to prejudice." *NLRB v.*

Adhesive Products Corp., 258 F.2d 403 (2d Cir. 1958). It is also in conflict with the Court of Appeals for the Fifth Circuit where no prejudice is required to be shown when a Board attorney's relevant testimony is improperly excluded. *N.L.R.B. v. Capitol Fish,* 294 F.2d 868 (5th Cir. 1961). Even in the Ninth Circuit, prior to this case, if the limitation of cross-examination was to the Respondents' "possible prejudice" the matter should be remanded for further hearing. *NLRB v. Blase,* 338 F.2d 327 (9th Cir. 1964).

2. The Court of Appeals for the Ninth Circuit ignored the uncontested fact that the attorney for the General Counsel admittedly limited his search to "signed statements" even though the Court specifically noted in another connection that, signed or not, if memoranda contained substantially verbatim accounts of pretrial statements they should have been produced, citing *Palermo v. United States,* 360 U.S. 343, 345-346 (1959); Jencks Act, 18 U.S.C. § 3500 (e).

3. The Court of Appeals below has created a test for establishing prejudice that is impossible to satisfy and, therefore, prevents your Petitioners, and all similarly situated, from obtaining relief from the wrongful and erroneous withholding of pretrial or prehearing statements of witnesses, all of which amounts to a substantial denial of due process of law.

4. The N.L.R.B. issued its order prior to this court's decision in *American Ship Building v. N.L.R.B.,* 380 U.S. 360 (1965) and therefore did not view the actions taken by petitioners, in light of the economic impasse, with the tenants of that decision before it.

DISCUSSION

1. A conflict in the Courts of Appeals Has Been Created by the Decision of the Court of Appeals for the Ninth Circuit.

There is sufficient reason to grant this petition because there is now a conflict in the Federal Courts of Appeals with regard to the appropriate test, regarding prejudical procedural error, federal courts shall apply when reviewing decisions of administrative agencies. *Linkletter v. Walker,* 381 U.S. 618 (1965); *DiBella v. United States,* 369 U.S. 121 (1962); *Lehigh Val Co-op Farmers Inc. v. United States,* 370 U.S. 76 (1962); *United States v. Nugent,* 346 U.S. 1 (1953).

Prior to the decision below the Federal Courts of Appeals were fairly uniform in result when a party had been erroneously deprived of the opportunity to examine pre-hearing statement of the government agencies' witnesses, or when government agents or employees refused to testify in the absence of a validly exercised privilege. In *N.L.R.B. v. Adhesive Products Corp.*, 258 F.2d 403 (2d Cir. 1958), which first applied the Jencks rule to administrative hearings, the N.L.R.B. argued that the Respondents there had not been prejudiced. The Court found that the curtailment of the right to examine pre-hearing statements "constituted error that could not have failed to prejudice . . ." the Respondents.

Similarly, in connection with the admittedly erroneous revocation of *subpoenas ad testificandum* served upon Board employees, the Court of Appeals for the Fifth Circuit refused to enforce a Board order when a Board investigator refused to testify, because,

> "Fundamental fairness requires that Capitol Fish be allowed to introduce testimony that may impeach the evidence offered against it." [*N.L.R.B. v. Capitol Fish Co.*, 294 F.2d 868, 875 (5th Cir. 1961).]

Additionally, the Court of Appeals for the Seventh Circuit has found it to be reversible error for a Court to refuse to examine pre-hearing statements in camera. *United States v. Keig*, 320 F.2d 634 (7th Cir. 1964). See also, *Palermo v. United States*, 360 U.S. 343 (1959); *Williams v. United States*, 328 F.2d 178 (D.C. Cir. 1963); *Butler v. United States*, 317 F.2d 171 (D.C. Cir. 1963); *Saunders v. United States*, 316 F.2d 346 (D.C. Cir. 1963); *United States v. Tomaiolo*, 280 F.2d 141 (2d Cir. 1960); *United States v. McKeaver*, 271 F.2d 669 (2d Cir. 1959); *Anderson v. United States*, 262 F.2d 764 (8th Cir. 1959); *United States v. Aviles*, 197 F. Supp. 536 (S.D.N.Y. 1961).

The Court below argued that your Petitioners should have caused the pre-hearing documents to be incorporated into the record on appeal, under seal, to allow it to determine whether they should have been produced. The Court below fails to mention that it had an opportunity to examine at least a portion of the statements during the oral argument on this matter, when the attorney for the Board offered them to the Court for examination. Chief Judge Barnes expressed shock and indignation and suggested that the Board was too late in making the statements available. Your Petitioners should not have been denied their remedy of remand or non-enforcement of the decree, simply because the notes were not submitted to the Court "under seal" when at least some of the notes

were made available to the Court and it refused to examine them.

In contrast to the other Circuits, the Court of Appeals for the Ninth Circuit found below that even though your Petitioners have been denied pre-hearing statements, have been deprived of the right to examine Board agents, and even though the Trial Examiner failed to perform its affirmative duty with regard to examining the pre-trial statements, that your Petitioners must meet the Court's newly created test of prejudice before relief can be granted. Thus, there is sufficient conflict in the Federal Courts of Appeals to cause this Court to grant the Writ prayed for.

2. **The Testimony of at least Ten Additional Witnesses Should have been Stricken, Since the Attorney for the General Counsel Applied the Wrong Test in Determining which Pre-Hearing Statements he would Produce.**

The court below found that the testimony of at least ten witnesses who appeared at the reopened hearing should not be stricken because the counsel for the General Counsel represented to the Trial Examiner that he could not find any more statements, although he made a "thorough search." The court took the position that where statements are lost or destroyed in good faith the testimony of the witness need not be stricken. The court below ignored the fact, however, that the counsel for the General Counsel was applying the incorrect test in determining which statements he was searching for, and which he was to make available.

At the reopened hearing the counsel for the General Counsel represented to the Trial Examiner that he could not find additional *signed* statements of witnesses. (Tr. 4713, 4788, 5098, 5122). As the court below held in connection with other statements in the possession of the Board, if the counsel for the General Counsel had in his possession statements that "contained substantially verbatim accounts of pretrial statements orally made to a government agent by government witnesses, they should have been produced." (374 F.2d at 981) Since the counsel for the General Counsel erroneously was searching for only "signed statements" or those statements which were "authorized and ratified" by the witness, it was error for the court below to not require that at least the testimony of the 10 additional witnesses in question be stricken, and that the Board make new findings absent the stricken testimony.

3. The Newly Adopted Three Part Test which Petitioners Must Meet to Show Prejudice is on its face so Burdensome as to Deprive Petitioners and those Similarly Situated of Fundamental Due Process.

While the court below found that the Trial Examiner had committed error, it held that in order to prove petitioners were prejudiced it would be necessary to show:

> (1) that the inspection of the withheld memoranda and the enforcement of subpoenas would have *actually unearthed hitherto undisclosed statements; and*
>
> (2) that by means of cross examination based on these statements the testimony of several witnesses *would have been successfully impeached; and*

(3) that the Board, in light of the impeached testimony *would have made different findings.*

Even though the court found that the Trial Examiner and Board committed two fundamental procedural errors: (1) failure to personally examine certain memoranda to determine whether they were producible under the appropriate test, and, (2) revoking subpoenas properly served upon Board employees in the absence of a recognized evidentuary objection, the court found that, under its new test, no prejudice resulted.

The improper revocation of subpoenas was, in *General Engineering Inc. v. NLRB,* 341 F.2d 367 (9th Cir. 1965), sufficient error to cause the court in that case to refuse to enforce the Board order and to order a remand for appropriate further hearing, and no specific showing of prejudice was required. The court below attempted to distinguish *General Engineering* from the instant case on the basis that in *General Engineering* there was an offer of proof made by the party seeking the enforcement of the subpoenas, and that because of alleged inconsistent explanations made by the government's attorneys, there was good reason to believe that some producible documents might have been withheld. It is submitted that this alleged destination is insufficient to cause the court below to reach a different conclusion with respect to the instant case. If the court were to have applied the newly adopted test regarding prejudice to the *General Engineering* matter, the result there would have been the same as the result below. In fact, it is impossible to comprehend how the test could be applied in any case to provide relief from such errors.

As a matter of practicality and logic no respondent could meet the burden created by the test. It might be possible to satisfy the first portion of the test, if all available statements were ultimately produced by the particular governmental agency. There would, it is submitted, never be a case where a respondent could prove that it would successfully impeach a witness by use of the statement. The skill of the cross examiner, the demeanor, memory and ability of the witness, the attitude and skill of the trier of fact all may or may not play a part in whether the use of the statement during cross examination would successfully impeach a given witness.

The third portion of this conjunctive test needs no discussion. It is simply impossible, as a logical matter, to forecast whether any agency would or would not make different findings.

Aside from the obvious practical and logical deficiencies in the test, it is void as a legal matter for depriving your petitioners of procedural due process. As recently as 1964 the same court of appeals examined the prejudice that can be suffered by a respondent by the failure of the Board to produce pretrial statements. In *Harvey Aluminum v. NLRB*, 335 F.2d 749 (9th Cir. 1964), the court refused to enforce an order of the Board, saying:

> "Prior statements of a witness relating to his testimony must be produced by the government because 'justice requires no less'. *Jencks v. United States, supra*, 353 U.S. at 669, 77 S. Ct. 1007, 1 L. Ed. U.S. 1103. The rule applies to proceedings of the Board because ' "the laws under which these agencies operate prescribe the fundamentals of fair play."

> Their proceedings must satisfy the pertinent demands of due process.' *Communist Party of the United States vs. Subversive Activities Control Board,* 102 U.S. App. D.C. 395, 254 F.2d 314, 327 (1958)." (335 F.2d 753.)

This court has said that the right to a fair and open hearing is one of the

> "'. . . rudiments of fair play' . . . assured to every litigant by the Fourteenth Amendment as a minimal requirement. . . . There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored." [*Ohio Bell Telephone Company v. Public Whites Commission,* 301 U.S. 292, 304 (1936)]

Other courts of appeal have found it to be a denial of due process to exclude relevant evidence, and the extent of prejudice has not been found relevant. *Donnelly Garment Co. v. NLRB,* 123 F.2d 215 (8th Cir. 1942); *NLRB v. Burns,* 207 F.2d 434 (8th Cir. 1953); *cf., Kelly v. Herak,* 252 F. Supp. 289 (D.C. Mont. 1966).

Aside from logic, as a matter of law the court should not speculate upon what the Board would have otherwise done. *NLRB v. Burns;* 207 F.2d 434 (8th Cir. 1953), and therefore the last part of the test is clearly erroneous. Therefore, the court should have, at the very least, remanded the matter in order to allow the trier of fact to listen to all of the evidence and to make whatever additional or different findings it might find appropriate. *Russell-Newman Mfg. Co., v. N.L.R.B.,* 370 F.2d 980 (5th Cir. 1966); *Wheeler v. NLRB,* 314 F.2d 260 (D.C. Cir. 1963).

4. The NLRB's Finding, Approved by the Court Below Without Discussion, That the Petitioner Boatowners Violated Section 8(a) (3) of the Act is Directly Contrary to this Court's Holding in American Ship Building Company v. NLRB.

There can be no question that your Petitionering boatowners and the members of Local 33 had reached an impasse due to the union's adamant position with regard to refusing to work at the about to terminate contract rate.[1] The record is overwhelming that Local 33 had taken an official position with regard to the wage rate and its philosophy of "no contract — no work." Under the circumstances that existed — with the recognized "facts of life" in the San Pedro Harbor — Petitioners had no real freedom of choice but to take what steps were necessary to get the boats to sea. As Board member Fanning, dissenting below, stated in summing up Petitioners' plight (quoting, in part, the Trial Examiner):

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[1]Neither the Board nor the Trial Examiner nor the Court below denied this fact. Indeed, the Trial Examiner in his Intermediate Report correctly found:

"The wording of the notice constitutes an accurate description of the situation as it existed in late December. In fact the Employer Respondents *did not know* if their old crews were to sail again with them. Evidence that some of these employers were willing and eager to re-ship their old crews abounds. So does evidence that the crew members would not then sail without the protection of a contract between the Employer Respondents and Local 33. As the crews were forming in early January, members of Local 33 would not go through the picket line then being maintained by their union." [R. 722.] [Emphasis in original.]

" 'They [Petitionering boatowners] could try to seek agreement with Local 33 and they had before October done so without success. They could offer the cannery price and take along any competent person who was willing to go. The second alternative was chimerical and probaly not even considered. *Local 33 members would not fish without a contract; nor would members of Seine and Line.' In these peculiar circumstances to hold, as the majority does, that the termination of Local 33 crew members was unlawful discrimination seems to me to go beyond the statutory proscription.*

"Section 8(a) (3) forbids an employer to discriminate against his employees to encourage or discourage union membership. The majority find that the boatowners discharged their employees 'to avoid dealing with Local 33.' Obviously, an employer, who is opposed to a union or unionism and discharges an employee to rid himself of an unwanted union has engaged in discrimination that discourages membership in that union. *But the facts in this case do not, in my opinion, neatly fit that niche.* [Emphasis in original.] Here the inference is at least equally valid that the Employers replaced their Local 33 crews because they found it impossible to meet the economic demands of the crews, voiced adamantly throughout Local 33. *Indeed, as I read the record, these boatowners would have preferred continuing to contract with Local 33 if they had thought it economically possible to do so.* Under all the circumstances, I question whether the General Counsel has proved by a preponderance of the

evidence that the termination of these employees is conduct of the type proscribed in Section 8(a) (3). Accordingly, I would dismiss this allegation of the complaint." [R. 996, 997.] [Emphasis added.]

The Board, in finding violations of Section 8(a) (3), held that the employees were not engaged in a strike at the time they were "discharged." Aside from the fact that the so-called "clothes letters" cannot properly be construed as discharge notices,[2] it is still nonetheless quite clear and undisputed that union officials had persistently and repeatedly refused to let Local 33 members work very long prior to the decision of the Petitioners to send the "clothes letters." A cessation of work is no less a strike because it is unaccompanied by picketing and other activity. *Massey Gin & Machine Works, Inc.*, 78 N.L.R.B. 189 (1948); *Electric Auto Lite Co.*, 80 N.L.R.B. 1601

[2]The record reveals that before the letters were sent to the crew that the attorneys that represented Local 33 brought an action in the Southern District Court of California, wherein the Court interpreted the Local 33 working agreement in light of maritime law and the hiring practices in the San Pedro fishing industry. *Vitco v. Joncich*, 130 F. Supp. 945 (S.D. Cal. 1955). The Court held that a fisherman was entitled to his share of the catch even though he did not fish for the entire season. Attorney Gould was fearful that Local 33 would urge that a man who was hired, expressly *or by implication*, at the beginning of the year, would be entitled to his full share of the catch even though he did not fish. Accordingly, Gould advised the skippers to send the letters. [Tr. 2538-2539, 2602-2606, 3257-3259, 3660, 3661.] There was absolutely no anti-union animus present. There was merely an innocent intent to avoid having to pay men who refused to fish. The overriding intent of the skippers, of course, was to make the berths available for whomever they hired for the new season. While Petitioners' primary intent was to avoid having to pay non-fishing fishermen, the effect of the notices was no greater than a notice that Petitioners intended to replace those men who refused to work.

(1948): Where a work stoppage is directed by the union leaders and by a formal vote, then the refusal to work is a strike. *Alabama Marble Co.*, 83 N.L.R.B. 1047 (1949).

Most importantly, however, the Trial Examiner and the Board, whose decisions predated the decision of this Court in *American Ship Building Co. v. N.L.R.B.*, 380 U.S. 300 (1965), unschooled with and unilluminated by, completely ignored the dictates and tenets of the *American Ship Building* case. This Court in that case held that an employer does not violate Section 8(a) (3) where, as here, the lockout of its employees was motivated by legitimate economic reasons or for avoiding serious economic consequences. As the concurring opinion of Justice White held, a bargaining lockout is determined by balancing conflicting legitimate interests. Here, there can be no question that based upon the "facts of life," the Petitioners had no alternative and certainly, as even the Trial Examiner recognized, there was absent any anti-union animus on the part of Petitioners. In the final analysis, the Petitioners found themselves between Chrydibis and Silla. Having chosen the only course that allowed the boats to sail may formerly have been thought by some to have been a technical violation of the Act. This Court's realistic holdings in American Ship Building have now properly laid to rest such a technical violation with such serious repercussions to employers and have adopted realistic indicia for ascertaining the propriety of employers' actions in these circumstances.

Since the decision of this Court in *American Ship Building* and after the Trial Examiner's and Board's decision in the instant case, the Board itself has recog-

nized and developed a liberal view of the right of employers to utilize a lockout or related tactics to avoid serious economic harm. That this penicillin was not afforded to Petitioners can only be ascribed to the fact that this Court's prescription was not enunicated until 1965.

The Board has recently held, relying upon *American Ship Building,* that an employer's lockout tactics were justified in light of the fact that the union over a long period of time had neither receded nor offered to compromise with respect to its original demands and that an impasse in bargaining was inevitable. *Union Carbide Corp.,* 165 NLRB No. 26 (June 15, 1967). Soon thereafter, the Board in *The Evening News Association,* 166 NLRB No. 6 and *Weyerhaeuser Company,* 166 NLRB No. 7 (July 4, 1967) held that the pre-*American Ship Building* distinction between "offensive" and "defensive" lockouts by an employer has now been "obliterated as a matter of law." In the Board's view, a tactical lockout is legal if there is (1) a significant economic justification, and (2) a lack of conduct significantly prejudicial to union or employee interest. In the instant case, the Court below, the Board and the Trial Examiner all recognized the significant economic justification for the Petitioners' actions. The Trial Examiner's decision and the record reveal, moreover, that the action of Petitioners was not for the purpose of discriminating against Local 33 or favoring the Seine and Line Union; rather, the record shows that Petitioners preferred to have dealt with both Local 33 and its member-employees. Local 33, however, gave Petitioners no choice.

As recently as July 27, 1967, a Trial Examiner for the NLRB in *United States Sugar Corp.* (12-CA-3578; TXD-418-67; BNA 146 DLR, July 27, 1967) was met with a similar set of circumstances as in the instant case. He found, as in the instant case, that an impasse between the parties had been reached and that, therefore, the employer there was privileged, without violating the Act, to lay off its employees at any time while the bargaining impasse was in effect. He similarly found that the employer's failure to recall the laid off employees was not violative of Sections 8(a)(1) and 8(a)(3) of the Act.

In light of *American Ship Building* and the Board's recent elaboration of that case, it can hardly be denied that Petitioners' conduct, which the Board found to be violative of Section 8(a)(3) in 1962, would not today be considered an unfair labor practice. The error of the Board, though not excusable, is understandable. The Court below, however, erroneously failed to give any consideration whatsoever to the implications of *American Ship Building*.

CONCLUSION

For the foregoing reasons, we respectfully request that a writ of certiorari to the United States Court of Appeals for the Ninth Circuit issue.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, *Petitioner*, vs. SEINE AND LINE FISHERMEN'S UNION OF SAN PEDRO, affiliated with SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, *Respondent.*	No. 19,227
NATIONAL LABOR RELATIONS BOARD, *Petitioner*, vs. PAUL BIAZEVICH, et al., dba M. V. LIBERATOR, et al., *Respondents.*	No. 19,228

[January 6, 1967]

On Petitions for Enforcement and Cross-Petitions for Review of Orders of the National Labor Relations Board.

Before: BARNES, JERTBERG and KOELSCH, Circuit Judges KOELSCH, Circuit Judge.

These cases are before the court upon separate petitions of the National Labor Relations Board for enforcement of two separate orders, both issued March 2, 1962. This court has jurisdiction under Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e), the

alleged unfair labor practices having occurred in San Pedro, California, within this judicial circuit.

Respondent boat owners operate fishing vessels out of San Pedro Harbor in Southern California. In 1955 the fishermen on these boats were represented by Fishermen's Union, Local 33 ILWU. When tuna prices declined markedly in the summer of 1955, the boat owners asked the members of Local 33 to accept wages substantially lower than those to which they were contractually entitled. They refused. As a result, the boat owners, unable to operate at a profit, decided to tie up their boats for the remainder of the year.

Looking ahead to the 1956 season, the boat owners gave Local 33 timely notice of intent to terminate their contract at the end of 1955. In addition, during the last few months of that year the boat owners made it clear to their crew members that continued employment was contingent upon joining Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarer's International Union of North America, AFL-CIO, the only other available source of labor in the area. It is noteworthy that Seine and Line members, having agreed to accept lower wages, continued fishing throughout 1955.

Late in December, 1955, the boat owners sent certain "clothes letters" to their crew members instructing them to remove their belongings from the boats by December 31. In early January 1956 the boat owners, true to their warnings of the past few months, signed an exclusive collective bargaining agreement with Seine and Line. The union security provision of this contract made

membership in the Seine and Line Union an express condition of employment on the boats in question. As a result, most of the Local 33 fishermen refused to fish on these boats in 1956.

On the basis of these facts,[1] the Board, in No. 19,228, made the following conclusions. First, the boat owners, by telling their crew members that they would be replaced unless they joined Seine and Line, interfered with, restrained, and coerced their employees in violation of Section 8(a) (1) of the Labor Management Relations Act, 29 U.S.C. § 158. Second, in accord with a general understanding in the industry, the "clothes letters" constituted discharges of 52 members of the 1955 crew. Because these discharges were motivated by a desire to avoid dealing with Local 33, they were discriminatory within the meaning of Sections 8(a) (3) and 8(a) (1) of the Act. Third, in early January 1956 Seine and Line was not the majority representative of the employees and, at any rate, Local 33 was vigorously maintaining its continuing majority status. Consequently, by entering into and enforcing a union-security contract with Seine and Line at that time the employers discriminated against Local 33 and rendered unlawful assistance and support to Seine and Line, all in violation of sections 8(a) (1), 8(a) (2) and 8(a) (3) of the Act. Fourth, by their participation in the above mentioned contract Seine and Line restrained and coerced employees in violation of sections 8(b) (1) (A) and 8(b) (2) of the Act. Fifth, several of the union security provisions of the

[1]For a more comprehensive analysis of the relevant facts see the Board's own opinion in this case. Paul Biazevich, et al., d/b/a M. V. Liberator, 136 N.L.R.B. 13 (1962).

Seine and Line contract were unlawful on their face. By incorporating into the contract and by enforcing such provisions, the employers violated sections 8(a) (1), 8(a) (2) and 8(a) (3) of the Act, and Seine and Line violated sections 8(b) (1) (A) and 8(b) (2) of the Act.

In No. 19,227 the Board found that Seine and Line's collective bargaining agreements entered into after September 1956 with the owners of 43 other fishing vessels violated sections 8(b) (1) (A) and 8(b) (2) of the Act by virtue of their inclusion of the identical unlawful union security provisions struck down in No. 19,228.

Respondents attack nearly every one of these findings. They claim that their statements, rather than being coercive, merely reflected the facts of labor life in San Pedro Harbor; that the "clothes letters" were not intended to be discharges but, even if they were, the critical factor of illegal intent was not proven; that Seine and Line did represent a majority of the employees but even if it did not the employers had no reasonable basis for crediting Local 33's claim of majority representation; that the union security provisions of Seine and Line's contracts, although technically deficient, were not illegal per se.

Respondents propounded these same claims to the Board, but each was rejected. The Board, in assessing the facts and the inferences to be drawn from them, made contrary conclusions about the nature and significance of the events in issue.

Our scope of review is limited. The question before us, as reviewing court, is not whether the conclusions drawn by the Board are right, but rather whether they are reasonable. See 4 DAVIS, ADMINISTRATIVE LAW

§ 29.06, at 143 (1958). It is not our province to displace the Board's interpretation of conflicting views with our own.

In light of these principles we conclude that the findings of the Board are supported in each case by substantial evidence considering the record as a whole and that, although different inferences might have been drawn from the facts, the Board's construction of the events herein is both reasonable and proper.

But respondents claim that even if there is substantial evidence in the record to support the findings of the Board, we should deny enforcement to the Board's order because the entire proceedings were tainted by grave procedural errors.

Perhaps an outline of the procedural events is in order. This hearing was opened August 5, 1957 and closed July 9, 1958. However, for reasons to be discussed below, the hearing was reopened September 8, 1958 and not ultimately concluded until January 12, 1959.

At the original hearing the trial examiner upheld the refusal of the attorney for the general counsel to produce for purposes of impeachment the signed prehearing statements of witnesses who had testified for the general counsel. After the hearing closed, but before the trial examiner issued his intermediate report, the Board in *Ra-Rich Mfg. Corp.*, 121 N.L.R.B. 700 (1958), under the compulsion of *N.L.R.B. v. Adhesive Products Corp.*, 258 F.2d 403 (2d Cir. 1958) recognized that the principal announced in *Jencks v. United States*, 353 U.S. 657 (1957), regarding the right of counsel in a criminal trial to examine pretrial statements of witnesses called by the government,

was applicable to Board proceedings. Consequently, the trial examiner reopened the record and directed the general counsel to supply respondents with all pre-trial statements made by witnesses who had testified in the earlier proceeding.

At the reopened hearing, 58 of the 71 witnesses who had testified at the original hearing returned and were cross-examined on the basis of their pretrial statements. About 13 witnesses, whose statements had been handed over to respondents, failed to appear for further cross-examination. The Board, however, adequately protected respondents' rights by striking the testimony of these non-appearing witnesses from the record.[2]

But respondents contend that the 58 witnesses subjected to cross-examination at the reopened hearing, over 10 testified to the existence of signed statements which were never produced. Since these statements were allegedly given to either the general counsel or to counsel for the charging party, respondents claim that the Board

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[2]Respondents contend that it was error for the trial examiner to close the hearing before the return date of subpoenas ad testificandum issued to several of those witnesses whose testimony was thus stricken. Respondents have made no claim that they could adduce newly discovered positive evidence through these witnesses. Since the pretrial statements were intended for impeachment purposes, [Palermo v. United States, 360 U.S. 343 (1959)], striking the testimony of such witnesses accomplished for respondents the very best result which they could have hoped to achieve.

erred in failing to strike the testimony of such witnesses in accord with Board Rule 102.118.[3]

However, at the reopened hearing the attorneys for the general counsel and for the charging party, in response to questioning by counsel for respondents, repeatedly stated that they had thoroughly searched their records and had been unable to find any statements other than those which they had already handed over.[4] Where statements have been lost or destroyed in good faith the testimony of the witnesses concerned need not be struck. See *Killian v. United States,* 368 U.S. 231, 239-43 (1961); *United States v. Tomaiolo,* 317 F.2d 324, 327-28 (2d Cir. 1963), *cert. denied,* 375 U.S. 865 (1963).

Next, respondents assert that at the reopened hearing the trial examiner unduly limited the scope of cross-examination of those witnesses who did reappear. It is true that at one point he ordered respondents to limit

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[3]N.L.R.B. Rules and Regulations, as amended, 29 C.F.R. § 102.118 reads, in part relevant here:

> "After a witness called by the general counsel has testified in a hearing upon a complaint under section 10(c) of the act, the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken."

[4]In view of these circumstances, we find it unnecessary to determine whether the rationale of Harvey Aluminum, Inc. v. N.L.R.B., 335 F.2d 749 (9th Cir. 1964), extends so far as to require the production of statements in the possession not of the United States government but of a private party working in close harmony with the government.

their examination to establishing merely the fact of an omission from a witness' affidavit of facts later related by the witness at the hearing. This is contrary to the Board's own ruling in *Tidelands Marine Service,* 126 N.L.R.B. 261 (1960), where it held applicable to Board proceedings the following quotation from *Jencks v. United States,* 353 U.S. 657, 667 (1956):

> "Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the report of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony."

If, by such a ruling, respondents were denied the opportunity to subject the general counsel's witnesses to a full, complete and proper cross-examination, it is possible that they suffered prejudice.[5] However, such was not the case. Our independent review of the record[6] fails to show that this ruling was enforced. On the contrary,

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[5]Note that in N.L.R.B. v. Bear Brand Roofing, Inc., 312 F.2d 616 (10th Cir. 1962), a limitation of cross-examination to inconsistencies and contradictions was held *not* prejudicial and the petition was enforced.

[6]Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e) provides in pertinent part that "in making the foregoing determinations the court shall review the whole record *or such portions thereof as may be cited by any party. . . .*" (Emphasis added). Although counsel for respondents cited us to the above mentioned ruling, they did not direct our attention to one specific instance in this voluminous record of over 10,000 pages where the trial examiner used this ruling to curb the scope of proper cross-examination.

it appears that, on the whole, the trial examiner was quite liberal in permitting cross-examination.

Furthermore, before the Board, respondents did not except to the intermediate report on the ground that the examiner had improperly limited the scope of cross-examination during the reopened hearing. Accordingly, in the light of section 10(e) of the Act,[7] "the failure or neglect of the respondents to urge an objection in the Board's proceedings forecloses judicial consideration of the objection in enforcement proceedings." *N.L.R.B. v. Ochoa Fertilizer Co.*, 368 U.S. 318, 322 (1961). See also *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 350 (1953); *N.L.R.B. v. Noroian*, 193 F.2d 172 (9th Cir. 1951).

The next assignment concerns the general counsel's refusal at the reopened hearing to consent to the giving of testimony by Regional Director Kennedy and Board Attorney O'Brien. Respondents had intended to interrogate them concerning the existence of any and all documents, not already in respondents' possession, which might be useful for purposes of impeachment. Relying solely on Board Rule 102.118,[8] the trial examiner

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[7]Section 10(e) of the National Labor Relations Act, 29 U.S.C. § 160(e) provides in part: "No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."

[8]NLRB Rules and Regulations, as amended, 29 C.F.R. § 102.118 provides in part relevant here:

> "No regional director, field examiner, trial examiner, attorney, specially designated agent, general counsel, member of the Board or other officer or employee of the Board shall pro-

revoked subpoenas duces tecum and ad testificandum properly issued to these employees.

In *General Eng'r, Inc. v. N.L.R.B.*, 341 F.2d 367 (9th Cir. 1965), this court ruled that § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), prohibits the Board from excluding evidence which would be otherwise admissible under the general rules of evidence. The mere existence of Rule 102.118, which expressly forbids employees of the Board from complying with subpoenas duces tecum in the absence of written consent of the general counsel, is not enough to create a recognized evidentiary privilege. In the absence of some valid evidentiary objection, Rule 102.118 cannot be invoked to revoke properly issued subpoenas duces tecum. See also *N.L.R.B. v. Capitol Fish Co.*, 294 F.2d 868 (5th Cir. 1961). Accordingly, the trial examiner erred in this ruling.

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duce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, Territory, or the District of Columbia with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board, whether in answer to a subpoena, subpoena duces tecum, or otherwise, without the written consent of the Board or the chairman of the Board if the official or document is subject to the supervision or control of the Board; or the general counsel if the official or document is subject to the supervision or control of the general counsel. Whenever any subpoena ad testificandum or subpoena duces tecum, the purpose of which is to adduce testimony or require the production of records as described hereinabove, shall have been served upon any such persons

Respondents further assert that the general counsel had certain statements in his possession to which respondents should have had access. At the reopened hearing, Board Attorney O'Brien advised the trial examiner that he had located three stenographic notebooks, all in the handwriting of deceased Field Examiner Karl W. Filter, containing notes relating to the statements of the government's witnesses. Although O'Brien refused to show these memoranda to either the witnesses or opposing counsel he did ask for leave to show them to the trial examiner. The trial examiner refused to examine the documents; furthermore, he declined to order the general counsel to supply them to respondents.

The Board held that the trial examiner's ruling was proper, since none of the notes were signed or authenticated by the witnesses. But if the "Filter memoranda" contained substantially verbatim accounts of pretrial statements orally made to a government agent by government witnesses, they should have been produced. *Cf. Palermo v. United States,* 360 U.S. 343, 345-46 (1959); Jencks Act, 18 U.S.C. § 3500(e). Any construction of the "signed or otherwise approved or adopted" clause of Board Rule 102.118 which would not require that such statements be turned over would be invalid. *Harvey Aluminum, Inc. v. N.L.R.B.,* 335 F.2d 749, 756 & n.25 (9th Cir. 1964).

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or other officer or employee of the Board, he will, unless otherwise expressly directed by the Board or the chairman of the Board or the general counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this rule. . . ."

In a case like this where the Board agent's death precluded any clarification on his part, and where the hazy memories of the witnesses at the reopened hearing made it impossible for them to lay the proper foundation of approval of Filter's writings, it was incumbent upon the trial examiner to examine each of the documents and determine whether they met the "substantially verbatim" test. See *Williams v. United States*, 328 F.2d 178 (D.C. Cir. 1963). At the very least he should have conducted an in camera inspection of the documents. See *General Eng'r, Inc. v. N.L.R.B.*, 341 F.2d 367, 376 (9th Cir. 1965). His reliance on the representations of the general counsel and his refusal to examine the documents when urged to do so was error. See *United States v. Kieg*, 320 F.2d 634 (7th Cir. 1963).

In summation, it appears that the trial examiner committed only two procedural errors. First, he should have personally examined the Filter memoranda to see if they were substantially narrative accounts of the witnesses' statements, and thus produceable on demand. Second, in the absence of a recognized evidentiary objection, he should not have revoked the subpoenas duces tecum issued to the Board employees.

Nevertheless, we do not consider these errors sufficiently grave to deny enforcement.[9] In accord with section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 1009(e) a court, on review of an administrative deter-

[9]As respondents themselves admit in their brief, the lapse of almost twelve years since the occurrence of the operative facts militates against remand. The passage of time has rendered a meaningful hearing at this late date virtually impossible.

mination, should take due account of the rule of prejudicial error. Procedural irregularities are not per se prejudicial; each case must be determined on its individual facts and, if the errors are deemd to be minor and insubstantial, the administrative order should be enforced notwithstanding. See *Willapoint Oysters, Inc. v. Ewing*, 174 F.2d 676, 692 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949); *Kerner v. Celebrezze*, 340 F.2d 736 (2d Cir. 1965), *cert. denied*, 382 U.S. 861 (1965); *N.L.R.B. v. Ed Friedrich, Inc.*, 116 F.2d 888 (5th Cir. 1940). Moreover, "the burden of showing that prejudice has resulted" is on the party claiming injury from the erroneous rulings. *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943); *Ahern v. Webb*, 268 F.2d 45 (10th Cir. 1959). Respondents here have failed to meet this burden.

The purpose of both the requested in camera inspection by the trial examiner of the Filter memoranda and the enforcement of the subpoenas duces tecum issued to the Board employees was the same — to ascertain whether there existed any pretrial statements other than those already in respondents' possession which, under the guidelines established by both the courts and the Board, the government was obliged to produce. In other words, these measures were intended merely as threshold inquiries designed to generate the same result as would written interrogatories in pretrial discovery proceedings. But in that analogous area an erroneous refusal by a trial judge to order one party to answer interrogatories served upon him by another will not necessarily result in reversal. The moving party must show that he has suffered prejudice

thereby. *Bell v. Swift & Co.*, 283 F.2d 407 (5th Cir. 1960).

For respondents in this case to have been prejudiced by the two challenged rulings, it would be necessary first, that the inspection of the Filter memoranda and the enforcement of the subpoenas would have actually unearthed hitherto undisclosed statements; second, that by means of cross-examination based on these statements the testimony of several witnesses would have been successfully impeached; and third, that the Board, in light of this impeached testimony, would have made different findings. Respondents have failed to persuade us that the establishment of the first of these essential prerequisites—the discovery of pretrial statements not already in respondents' possession — is anything more than a remote possibility. Thus we find it unnecessary to indulge in conjecture about whether the second and third of these prerequisites would have followed.

Before we would be able to determine whether any of Filter's notes are the type of verbatim accounts which should have been turned over for use in cross-examination, we would need an opportunity to personally examine them. But the Filter memoranda have not been made a part of the record herein. "If petitioners wished review of the trial examiner's determination as to the nature of the report, it was incumbent upon them to see that a record was presented upon which review could be had, by requesting that the memorandum be submitted to the court under seal." *Harvey Aluminum, Inc. v. N.L.R.B.*, 335 F.2d 749, 756 (9th Cir. 1964). See also *United States v. Ebeling*, 146 F.2d 254, 256-57 (2d Cir. 1944);

General Eng'r, Inc. v. N.L.R.B., 341 F.2d 367, 376 (9th Cir. 1955); *Appeal of United States Sec. & Exch. Comm'n*, 226 F.2d 501, 510-11 (6th Cir. 1955). Since this was not done, it is impossible to determine whether the memoranda contained remarks which might have served to impeach any witnesses. "Accordingly, we cannot say that the ruling was prejudicial even if we assume it was erroneous." *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943).

Similarly, respondents have made no showing that any additional statements would have been produced by the subpoenas duces tecum. It is on this ground that the case of *General Eng'r, Inc. v. N.L.R.B.*, 341 F.2d 369 (9th Cir. 1965) can be distinguished. There petitioner made a specific offer of proof as to each of the four subpoenaed employees. *Id.* at 370 & n.3. In addition, because of inconsistent explanations made by the government's attorneys there was good reason to believe that some produceable documents might have been withheld.

There were no such extenuating circumstances in this case.[10] On the contrary, as mentioned earlier, counsel for the General Counsel had on several occasions made it clear that he had already handed over all the pretrial statements in his possession.

Respondents' final thrust is directed against the Board's orders. They claim that the order of back pay and reinstatement is unwarranted; that the revocation of Seine and Line's certification and the setting aside of its collec-

[10]A refusal to issue a subpoena, although error, is not always prejudicial. See N.L.R.B. v. Central Oklahoma Milk Producers Ass'n, 285 F.2d 445 (10th Cir. 1960).

tive bargaining agreements with the boat owners herein is exceedingly harsh; that reimbursement of the discriminatees for all dues, initiation fees, assessments and support money illegally exacted from them is unjustifiable.

However, under section 10(c) of the Act the Board is charged with an extremely broad latitude in fashioning remedies to effectuate the purposes of the Act as a whole. *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953). Wherever possible the Board's order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540 (1943). We cannot say that the Board's orders in these cases run afoul of this test.

We have examined respondents' other points on this appeal but find them totally lacking in merit. Accordingly, the Board's orders in No. 19227 and No. 19228 are affirmed and shall be enforced.

APPENDIX B

Paul Biazevich, Dinko Biazevich and Jerry Kusar, d/b/a MV *Liberator*; John Gargas, Nick Gargas, John I. (Jack) Gargas, and Nick Andrich, Jr. d/b/a MV *City of Los Angeles*; Vincent Budrovich and Western Boatbuilding Company, d/b/a MV *Delores M.*; John Cvitanich and Tom Mason, d/b/a MV *Sea King*; Steve Gargas, Anita Gargas, Francis Trutta, Mate Trutta and Frank S. Gargas d/b/a MV *Columbia*; Nick Marincovich and South Coast Fisheries, d/b/a MV *New Sea Rover*; Norman Mezin and Western Boatbuilding Company, d/b/a MV *Western Fisher*; Andrew Rafkin, Jr., Matt Dragich, Peter Dragich and Frank Kostrencich, d/b/a MV *Sea Scout*; John Sestich, Dominic Picinich, Nick Mosich, Gloria Wall and Miles Grades, d/b/a MV *Arlene S.*; John Stanovich, Nickolas Stanovich, Carl A. Larsen and French Sardine Company, d/b/a MV *Golden West*; John Misetich, Dominick Misetich, Jakov Misetich, Martin Tarabochia, Anton Karmen Misetich, Charles A. Curevich and Mathie D. Curevich, d/b/a MV *Ronnie M.*; John Zorotovich, Philip Mladineo, Martin Monas, Anton Misetich, Ivan Misetich and Dominick Misetich, d/b/a MV *Defense*; Lawrence Zuanich, John A. Zuanich and Constanta Zardeneta, d/b/a MV *Stranger*; John K. Vilicich, Administrator of the Estate of Andrew Vilicich, Deceased, d/b/a MV *Marsha Ann*; and American Tuna Committee *and* Fishermen's Union, Local 33, ILWU *and* Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International

Union of North America, AFL-CIO, Party to the Contract[1]

Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO *and* Fishermen's Union, Local 33, ILWU *and* American Tuna Committee, Party to the Contract. *Cases Nos. 21-CA-2388, 21-CA-2389, 21-CA-2390, 21-CA-2391, 21-CA-2392, 21-CA-2393, 21-CA-2394, 21-CA-2395, 21-CA-2396, 21-CA-2397, 21-CA-2398, 21-CA-2399, 21-CA-2400, 21-CA-2401, 21-CA-2402, and 21-CB-772. March 2, 1962*

DECISION AND ORDER

On February 9, 1960, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled proceeding, finding that all the Respondents except Lawrence Zuanich, John A. Zuanich and Constanta Zardeneta, d/b/a MV *Stranger*, had engaged in and were engaging in certain unfair labor practices and recommending that they cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto. Thereafter, exceptions to the Intermediate Report and supporting briefs were filed by the Respondent Employer, American Tuna Committee (herein referred to as ATC); the Respondent Union,

[1]Fishermen's Union, Local 33, ILWU, is the Charging Party, and Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, is the Party to the Contract, in Cases Nos. 21-CA-2388 through 21-CA-2402. The individual Employers as well as American Tuna Committee, of which they are all members, are referred to as Respondent Employers.

Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO (herein referred to as Seine and Line); the Charging Party, Fishermen's Union, Local 33, ILWU (herein referred to as Local 33); and the General Counsel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial

error was committed.[2] The rulings are hereby affirmed. The Board has considered the entire record in these cases,[3] including the Intermediate Report and the exceptions and briefs,[4] and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner

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[2]ATC moved to dismiss the complaint on the ground that the Trial Examiner at the opening of the hearing erroneously granted the General Counsel's motion to strike the following affirmative defenses from the ATC answer: (1) that Local 33 refused to recognize or bargain with ATC or other boatowners between October 26 and December 15, 1955, in violation of Section 8(b)(3); (2) that Local 33 called a strike with the object of forcing the boatowners to designate the Fishermen's Cooperative Association (herein referred to as the Co-op) as their bargaining representative, in violation of Section 8(b)(1)(B) and (4)(A); and (3) that Local 33 failed to comply with the filing requirements set forth at that time in Section 9(f), (g), and (h). No charges have been filed alleging that Local 33 engaged in the violations designated as (1) and (2). Furthermore, there is no contention, and the record does not show, that the Respondents were precluded from introducing evidence in support of these allegations. Moreover, the first contention is irrelevant as it does not constitute a defense to the violations alleged in this complaint. To the extent that (2) is relevant to the illegal strike issue herein, all evidence adduced in support thereof has been carefully considered by the Board in its resolution of this and other issues in these cases. As to (3), it is well established that, prior to the repeal on September 14, 1959, of Section 9(f), (g), and (h), the Act required that a charging party be in compliance therewith only on the date the complaint was issued. *Stowe-Woodward, Inc.*, 123 NLRB 287, 297. Moreover, the factual question of compliance is litigable only in a collateral proceeding which none of the parties requested. *Sea View Industries, Inc.*, 127 NLRB 1402, footnote 1. We are administratively satisfied that Local 33 was in compliance on the date the complaint was issued, and, therefore, we find that the striking of the aforesaid defenses by the Trial Examiner was not prejudicial.

with the following exceptions, modifications, and additions:

1. During the original hearing, the Respondents made several efforts to obtain pretrial statements of the General Counsel's witnesses. Counsel for the General Counsel refused to produce them, and his refusal was affirmed by the Trial Examiner, the General Counsel, and the Board on interlocutory appeal, in accord with the Board policy at that time as expressed in *The Great Atlantic and Pacific*

The Respondents also objected to the following rulings by the Trial Examiner: (1) Refusal to grant continuances requested by the Respondent Union. It is well settled, however, that continuances are within the discretion of a Trial Examiner. *Plumbers and Steamfitters Union Local 100, affiliated with the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL-CIO, et al. (Beard Plumbing Company)*, 128 NLRB 398, 400. (2) Rejection of an offer of proof by ATC that a substantial number of the General Counsel's witnesses executed a document promising to pay attorney fees to the Charging Party's counsel out of backpay, leaving the amounts blank so that any or all of their backpay could be claimed. Such attorney fee arrangements, however, are not relevant in these proceedings. The motions to dismiss on these grounds are therefore hereby denied.

[3]The Respondents moved to dismiss the complaint because of the Board's delay in issuing the complaint and in proceeding with the hearing, allegedly caused by the Board's decision to litigate first a representation proceeding involving the same parties. The Board's administrative determination to litigate the representation proceeding first, and the reasons therefor, are fully set forth in its Decision, Order, and Direction of Elections in that proceeding, *Krist Gradis, et al.*, 121 NLRB 601, 615. See *N.L.R.B. v. Wilson Line, Inc.*, 122 F. 2d 809, 816 (C.A. 3). This motion to dismiss is therefore denied.

[4]The Respondents' request for oral argument is hereby denied as the record, including the Respondents' briefs, adequately presents the issues and positions of the parties.

Tea Company, National Bakery Division 118 NLRB 1280. After the hearing closed but before the Trial Examiner issued his Intermediate Report, the Board, in *Ra-Rich Manufacturing Corporation,* 121 NLRB 700, overruled *The Great Atlantic and Pacific Tea* case, and required the production, upon request, for purposes of cross-examination, of pretrial affidavits made by witnesses who had testified in Board proceedings. Thereupon the Trial Examiner reopened the record in these cases and directed the General Counsel to produce all pretrial statements within the purview of the *Ra-Rich* decision. At the reopened hearing, the General Counsel and the Charging Party stated that they had produced all such statements in their possession. The 58 witnesses who had previously testified for the General Counsel returned and were cross-examined on the basis of their pretrial statements; 13 additional witnesses who had previously testified and had made pretrial statements which were produced did not return for cross-examination thereon.

The Respondents contend that the complaint should be dismissed because the pretrial statements were produced too late for effective cross-examination. It is clear, however, that the Trial Examiner properly refused to require production of the pretrial statements prior to the issuance of the Board's decision in *Ra-Rich,* and the procedure he followed — ordering production of the statements and reopening the hearing for cross-examination on the basis thereof after *Ra-Rich* was issued — has been approved by the Board and the courts.[5] Moreover, lapse of time does

[5]See, e.g., *N.L.R.B.* v. *Adhesive Products Corp.,* 258 F. 2d 403 (C.A. 2); *Ra-Rich Manufacturing Corporation, supra; Tidelands Marine Service, Inc.,* 126 NLRB 261.

not, in itself, provide a basis for dismissing the complaint.

The Respondents further contend that the name of the 13 witnesses referred to above should be stricken from the complaint, or, alternatively, that their testimony should be stricken from the record.[6] We agree with the Respondents that the testimony of these 13 witnesses should, under the circumstances, be stricken from the record,[7] and the Respondents' motion to that effect is hereby granted. We do not agree, however, that the names of any of these 13 witnesses, whose alleged discriminatory discharges are discussed below, should be stricken from the complaint on this ground.[8]

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[6]The 13 are Ante Matura, Peter Uskovich, and Sam Uskovich of the *Columbia;* Tony Marincovich of the *Defense;* Anthony Dulcich (or Dolcich) and Jerry Marincovich of the *Delores M.;* James Kaseroff and Christ Lisica of the *Marsha Ann;* Vince Beato of the *New Sea Rover;* John Starcich of the *Sea King;* Mike Elich and Marion Petrov of the *Sea Scout;* and Vincent Gargas of the *Western Fisher.*

[7]*Lenscraft Optical Corporation and Rayex Corporation,* 128 NLRB 807, 814; *Tidelands Marine Service, Inc., supra; Conso Fastener Corporation,* 123 NLRB 1161.

[8]*Ibid.;* see also *New Madrid Manufacturing Company, a corporation, and Harold Jones, an individual, d/b/a Jones Manufacturing Company,* 104 NLRB 117, 119-120 enfd. as modified 215 F. 2d 908 (C.A. 8).

The Respondents also except to the credibility findings of the Trial Examiner, and particularly to his failure to refer in the Intermediate Report to the pretrial statements and the cross-examination thereon. It is well established that the Board will overrule a Trial Examiner's credibility findings only if it finds that they are clearly incorrect.[9] Having examined the entire record in these cases, we find no basis for overruling the credibility findings except as specifically provided herein.[10]

Although several other witnesses testified that they also signed pretrial statements for the Charging Party or the General Counsel, counsel stated that they were unable to identify such statements as they did not have them in their possession. Counsel for the General Counsel, in searching Regional Office files for pretrial statements, discovered several notebooks of a Board agent who had conducted the pretrial investigation and had examined some of the General Counsel's witnesses at the original hearing, but who died before the hearing was reopened. None of these notes were signed or authenticated by witnesses. We therefore find that the Trial Examiner properly refused to require the production of these alleged statements or of the Board agent's notes.

[9] *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F. 2d 362 (C.A. 3).

[10] We find merit in the Respondents' exception to the Trial Examiner's apparently inadvertent crediting of the testimony of Vlado Matejic of the *Sea Scout* that Andrew Rafkin, Jr., master, told him on December 23, 1955, that everyone in the crew would have to belong to Seine and Line in order to fish on that vessel, as the parties agreed at the hearing to strike this testimony. We note, however, that a fellow crewmember, Dragich, credibly testified to the same effect regarding this incident. This apparent inadvertence is therefore immaterial.

2. As more fully set forth in the Intermediate Report, Local 33, which represented the employees of the Respondent boatowners, refused in the late summer of 1955, to agree to accept wages lower than those required by their current contract. The boatowners, on the ground that they were unable to operate at a profit because of falling tuna prices, tied up their boats for the remainder of the year, withdrew authority from the Co-op to represent them, formed ATC, and gave Local 33 timely notice of intent to terminate their contract at the end of the year. Late in December 1955, the boatowners instructed their crews, by letters addressed to their homes to remove their belongings from the boats by December 31. On December 27, the crewmembers began to picket the ATC boats. On January 3, 1956, the boatowners met with a representative of Seine and Line and, in the early morning of January 4, signed a collective-bargaining agreement with that Union. Shortly thereafter they resumed tuna fishing operations with new crews.

We find, in agreement with the Trial Examiner, that the Respondent boatowners, by telling employees on various occasions during the fall and winter of 1955 that they could continue to work after the end of the year only if they joined Seine and Line, interfered with,

restrained, and coerced their employees in violation of Section 8(a)(1) of the Act.[11]

3. We likewise agree with the Trial Examiner that the Respondent Employers who own the *Liberator, City of Los Angeles, Delores M., Sea King, Columbia, New Sea Rover, Sea Scout, Arlene S., Ronnie M.,* and *Defense* discharged the members of their 1955 crews in order to avoid dealing with Local 33. The discharges were

[11]In a special defense to the 8(a)(1) allegations, ATC contends that the Trial Examiner erred in finding that the testimony of John Zorotovich, master of the *Defense,* did not in any substantial way deny the statements attributed to him by members of his crew, and that Zorotovich's testimony shows that he was merely informing the crew how they could cause the boats to resume fishing, which was held not unlawful in *Mike Trama (F/V "Sandy Boy"),* 125 NLRB 151. Zorotovich testified that he told his crewmembers he had heard from fishermen that Local 33 employees of ATC boats were going to form an AFL "B" union; that, although he did not tell them to change unions, he did tell them they should check with the AFL and, if the rumors were true, should let him know within 2 days what they were going to do because others were asking for chances to go fishing with him and he had to go fishing; and that, when he did not hear from any of his old crewmembers, he started hiring new men on December 29. It is clear that Zorotovich was in fact giving his employees a choice of changing unions or being replaced. Such remarks have been held unlawful in many cases, including the *Sandy Boy* case. There is no indication here, as there was in the remarks found not unlawful in *Sandy Boy,* that Zorotovich was only suggesting a way that the crew, the boat, and the master could resume fishing together. We therefore find no merit in this special defense.

In view of the fact that we have stricken from the record the testimony of the 13 witnesses named in footnote 6, above, we do not adopt any of the Trial Examiner's findings of Section 8(a)(1) violations based solely on their testimony, but adopt all his other findings of 8(a)(1) violations.

effected by the "clothes letters" which these boatowners sent to their crews telling them to remove their belongings from the boats by December 31, 1955. The record shows that, in accord with industry practice, crewmembers had an expectation of working aboard the same vessel until they were discharged or quit; that it was customary, therefore, for crewmembers to leave their clothes and belongings aboard the vessel between seasons; and that removing them was understood in the industry to signal the end of employment on that vessel, by quitting if removed voluntarily, by discharge if removed on orders from management. ATC contends in its brief that the "clothes letters" were not intended as discharges, but (1) were sent on advice of counsel to prevent crewmembers from claiming they were hired for the 1956 season and were therefore entitled to a share in the proceeds of the 1956 season whether or not they worked that season, pursuant to a court decision in the *Pioneer* case,[12] or (2) "were somewhat in the nature of a notification of intent to replace" the picketing crews who, ATC contends, were engaged in a strike, and the letters therefore "appear, on their face," to be a technical maneuver designed to induce the alleged strikers to resume work. However, these asserted reasons for sending the letters are inconsistent with each other, as well as with the position previously taken by ATC in a letter to Local 33 dated December

[12]The *Pioneer* case was an admiralty proceeding (*Vitco v. Joncich,* 130 F. Supp. 945) in which the U.S. District Court, S.D. California, in April 1955, held that a fisherman hired on the *Pioneer* in December 1951 to fish for tuna for the next season, but who became ill on board on January 24, 1952, and did not fish thereafter, must be paid his full share of the boat's proceeds for the calendar year 1952 under maritime law.

28, 1955, asserting that the crews had quit and that the boats had had no crews for many months. These reasons not only constitute shifting defenses, but, in addition, neither reason is supported by the evidence. Thus, while all eight masters who testified stated that the letters were sent on advice of counsel, only three of them testified that counsel's advice was based on the *Pioneer* case, and none of them gave to any crewmembers with whom they discussed the letters this reason for sending the letters. Nor do we agree that the letters were meant as notices of intent to replace strikers because, in addition to the considerations discussed below, the evidence shows that the decision to send them was made before the picketing began on December 27, 1955.[13] Accordingly, we find, in agreement with the Trial Examiner, that the "clothes letters" were intended by the boatowners who sent them, and were understood by the crewmembers who received them, to constitute discharges.

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[13]The following occurred before the picketing began: The master of the *Defense* told three members of his crew that they would soon receive the "clothes letters," and two others that they would have to join Seine and Line to fish with him in 1956; the master of the *Columbia* told a crewman that he would have to join Seine and Line to remain in his employ; the master of the *Sea Scout* told two crewmembers that they would have to join Seine and Line if they wished to remain with the vessel; the master of the *Sea King* told one crewman that he would receive a "clothes letter" and that the master would have to get a crew that belonged to Seine and Line, and told another crewman that he was thinking of "going Seine and Line," and, if he did, the old crew would not be retained; the master of the *Ronnie M.* handed one crewmember a copy of the "clothes letter"; and the master of the *Arlene S.* told two crewmembers that he was going to contract with Seine and Line, and they should take their clothes off the boat.

The boatowners contend, in effect, that even if the 1955 crewmembers are found to have been discharged, the discharges were not discriminatory as they were motivated solely by economic considerations. Thus, the boatowners assert that they were satisfied with the work performed by the crewmembers; that, as former members of Local 33 themselves, they would have preferred continuing to contract with that Union; and that they did not continue solely because the economic demands of the crewmembers, voiced through Local 33, were impossible to meet. Unlike our dissenting colleague, however, we do not find that the evidence supports the boatowners' contention that the economic demands of Local 33 were "impossible." In fact, contrary to the contention that the Local 33 demands were so inflexible that it was impossible for the boatowners to deal with that Union, the record shows that, even though Local 33 had a written collective-bargaining agreement with the boatowners covering the year 1955, Local 33 agreed on three occasions during the first 7 months of 1955 to modify that agreement to provide for progressive reductions in the rate of pay to crewmembers because of the falling price of tuna. When the price fell for the fourth time that year, the Union attempted to hold the line but, after the boatowners had refused for about 3 months to operate under the terms of the agreement, Local 33 gave in and offered to modify the written contract in certain respects, including acceptance of payment based on the market price of tuna. The boatowners, however, failed to pursue this offer of Local 33 to further modify the 1955 agreement. Thereafter, they avoided all efforts made by Local 33 to negotiate a new agreement for 1956, and, instead,

precipitately entered into a contract with Seine and Line, in which they agreed to pay the same rate which Local 33 had previously offered to accept. In addition, the boatowners failed to substantiate on the record their contention that they could not afford to pay their crews on the basis of the tuna prices in the Local 33 contract. Moreover, even if there were convincing evidence of economic hardship, it would not leave the boatowners free to discharge their employees in order to avoid dealing with their bargaining representative. The Board and the courts have held that neither good faith nor economic exigencies justify such discriminatory and coercive conduct.[14]

The Respondents further contend that the crewmembers were not entitled to reinstatement, even if they were discharged, because they engaged in an illegal strike with the object of forcing the boatowners to violate Section 8(a) (3) of the Act by renewing the collective-bargaining agreement between Local 33 and the Respondent boatowners, which contained an unlawful union-security clause, or by executing a new closed-shop contract; and, further, that the strike was in violation both of a no-strike clause in the Local 33 agreement and of Section 8(d) of the Act. We are convinced, however, that the employees were not engaged in a strike at the time they

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[14] *Weyerhaeuser Company,* 134 NLRB 1371; *Combustion Engineering, Inc.,* 130 NLRB 184, 201-202; *N.L.R.B.* v. *J. E. McCatron, et al., d/b/a Price Valley Lumber Co., et al.,* 216 F. 2d 212, 215 (C.A. 9); *N.L.R.B.* v. *National Maritime Union of America, et al. (The Texas Company),* 175 F. 2d 686, 689 (C.A. 2); *N.L.R.B.* v. *Gluek Brewing Company and Bach Transfer and Storage Company,* 144 F. 2d 847, 853 (C.A. 8); *N.L.R.B.* v. *Star Publishing Co.,* 97 F. 2d 465, 470 (C.A. 9).

were discharged. When the picketing began on December 27, 1955, the boats had been tied up for many months, during all of which time the employees were willing, while the boatowners were unwilling, to work under the terms of the then current agreement. Moreover, the boats customarily did no tuna fishing between Christmas and the end of the year. It is clear, therefore, as the Trial Examiner found, that there was no concerted stoppage of work and withholding of services because at the time in question no work was being scheduled or permitted by the boatowners.[15]

Moreover, even assuming that the picketing was considered to constitute a strike, it would clearly be an unfair labor practice strike. Continued employment of the old crewmembers in 1956 was conditioned upon their accepting Seine and Line as their bargaining representative, and these crewmembers were protected by the Act in their refusal to accept employment under such a discriminatory condition.[16] While one of the original objectives of the picketing was renewal of the Local 33 agreement, which contained an unlawful union-security clause, and while Local 33 did later request a closed-shop contract in return for withdrawal of its wage demands, the record neither shows that Local 33 was adamant in its union-security demands, nor that such demands were at any time a *major* objective of the picketing. On the contrary, Local 33 clearly indicated on a number of occasions

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[15] *Wakefield's Deep Sea Trawlers, Inc., and Wakefield Fisheries, Inc.*, 112 NLRB 1357.

[16] *J. W. Saltsman doing business as Saltsman Construction Company*, 123 NLRB 1176, 1181, enfd. in this respect 283 F. 2d 472 (C.A. 6).

its willingness to negotiate the terms of a new agreement with the boatowners. Moreover, as the Trial Examiner found, the boatowners terminated the Local 33 contract and discharged their employees not because of any objection to Local 33's union-security demands, as shown by the fact that their contract with Seine and Line contained unlawful union-security provisions, but because of their desire to replace Local 33 with Seine and Line as the representative of their employees. Under these circumstances, we see no justification for depriving these discriminatorily discharged employees of their rights under the Act[17] because, in the course of trying to negotiate with the boatowners, Local 33 made certain union-security demands.

Nor do we agree that the picketing, even assuming that it was a strike, violated the no-strike clause in the Local 33 agreement in view of the serious unfair labor practices which we have found in these cases.[18] Moreover, the procedure established in the no-strike clause provided that all disputes must be referred to a committee made up of representatives of Local 33 and the Co-op. As Local 33 contended in a letter to ATC dated December 29, 1955, the Respondent Employers' prior withdrawal of the Co-op's authority to represent it had rendered this provision of the contract inoperative.

We also disagree with the Respondent's contention that the picketing was unlawful because it occurred within the

[17]Cf. *N.L.R.B.* v. *Sunrise Lumber & Trim Corp.*, 241 F. 2d 620, 624-625 (C.A. 2), enfg. 115 NLRB 866; *Mackay Radio and Telegraph Company, Inc.*, 96 NLRB 740.

[18]*Arlan's Department Store of Michigan, Inc.*, 133 NLRB 802.

60-day period prior to the expiration date of the contract, in violation of Section 8(d) of the Act. We do not believe that Section 8(d) applies in a situation where, as here, it was the employers who served the 8(d)(1) notice on the union of their desire to terminate the contract, and who failed to offer to meet and confer with the union for the purpose of negotiating a new contract, as required by Section 8(d)(2), or to notify Federal and State mediation services of the existence of a dispute, as required by Section 8(d)(3). Having themselves thus failed to comply with the requirements of Section 8(d), the Respondent Employers cannot now invoke the provisions of that section to excuse them from the consequences of their unfair labor practices.[19]

Accordingly, we agree with the Trial Examiner that the Respondent Employers discharged the employees whose names are listed in Appendix A, attached hereto, in order to avoid dealing with Local 33, and not for the reasons advanced by the Respondent Employers, and that the Respondent Employers thereby violated Section 8(a)(3) and (1) of the Act.

4. Based on credited testimony of the master of the *Marsha Ann*, the Trial Examiner found that all the crewmembers of this vessel except James Kaseroff had been hired in 1955 for one trip only, and therefore ceased to be employees before the "clothes letters" were sent. The Trial Examiner credited testimony of Kaseroff, however, that he had not been told that his employment was for one

[19]Cf. *United Electrical, Radio and Machine Workers of America, Local 1113 (Marathon Electric Manufacturing Corp.)* v. *N.L.R.B.*, 223 F. 2d 338, 342 (C.A.D.C.).

trip only, and found that Kaseroff therefore remained an employee after the last trip until he was discriminatorily discharged by a "clothes letter."

Because Kaseroff did not return to the reopened hearing for cross-examination on his pretrial affidavit, we have stricken his entire testimony from the record. Without this testimony, the record establishes that all members of this crew were hired for one trip only. We therefore find that Kaseroff had ceased to be an employee of the *Marsha Ann* before he received the clothes letter, and, accordingly, that the owners of this vessel have not discriminatorily discharged any employees.

5. We adopt the Trial Examiner's findings that ATC and its boatowner members, except the owners of the *Stranger*,[20] rendered unlawful assistance and support to Seine and Line and discriminated against their employees, and that Seine and Line restrained and coerced, and caused and attempted to cause ATC and its boatowner members to discriminate against, such employees by entering into and enforcing a union-security contract.

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[20]All but three of the boatowners signed the Seine and Line contract on January 4, 1956; the *Marsha Ann* signed a few days later. The *Golden West* was a member of ATC from its inception; its owner recognized Seine and Line as the representative of its crew at the January 3 to 4 meeting, which he attended; and he signed the contract in May 1956. The owners of the *Stranger* did not attend the January 3 to 4 meeting and never did sign the contract.

Seine and Line was not at that time the majority representative of the employees covered by the contract.[21] Moreover, Local 33, which was the incumbent contractural Union, was vigorously maintaining that it was the continuing majority representative.[22] Accordingly, we find that, by such conduct, the Respondent Employers violated Section 8(a) (1), (2), and (3), and Seine and Line violated Section 8(b) (1) (A) and (2) of the Act.

6. The contract executed by Respondent Employers and Seine and Line required, as conditions of employment, that all employees (1) join and pay dues to Seine and Line or, if not members, pay support money to that Union, without allowing the statutory 30-day grace period, (2) pay unspecified nonperiodic assessments, and (3) execute involuntary checkoff authorizations. The contract also called for forfeiture of earnings by all employees who failed to pay to Seine and Line the amounts

[21]Cf. *Bernard-Altmann Texas Corporation,* 122 NLRB 1289, 1291-1292, enfd. 280 F. 2d 616 (C.A.D.C.), affd. 366 U.S. 731. In the absence of exceptions thereto, we hereby adopt *pro forma* the Trial Examiner's finding that the employees of all the boat-owner-members of ATC constitute an appropriate unit. In finding that Seine and Line did not represent a majority of employees in this unit on January 4, 1956, we rely on the fact that the crew-members found to have been discriminatorily discharged constituted a substantial majority of the employees on these vessels, and they had not designated Seine and Line as their representative; we do not rely on Seine and Line's failure to prove, as an affirmative defense, that it represented a majority, as discussed by the Trial Examiner. See *Local Lodge No. 1424, International Association of Machinists, AFL-CIO, et al. (Bryan Manufacturing Co.)* v. *N.L.R.B.,* 362 U.S. 411, footnote 7.

[22]*Midwest Piping & Supply Co., Inc.,* 63 NLRB 1060; *Novak Logging Company,* 119 NLRB 1573.

described above and who were not discharged therefor. By incorporating into their contract and enforcing the aforesaid union-security provisions, we find, as did the Trial Examiner, that the Respondent Employers, except the owners of the *Stranger,* violated Section 8(a)(1), (2), and (3) of the Act and that Seine and Line violated Section 8(b)(1) (A) and (2) of the Act.[23]

THE REMEDY

Having found that the Respondent Employers and the Respondent Union have engaged in unlawful practices, we shall order that they cease and desist therefrom and take certain affirmative action necessary to effectuate the policies of the Act.

We have found that all the Respondent Employers, except the owners of the *Marsha Ann, Golden West, Western Fisher,* and *Stranger,* discriminatorily discharged their employees. We shall therefore order them to offer to such employees immediate and full reinstatement on the vessels from which they were discharged, without prejudice to their seniority or other rights and privileges, and make each of them whole for any loss of pay suffered as a result of the discrimination against him during the period from March 30, 1956,[24] until the date the vessel in

[23]We do not pass on the Trial Examiner's additional finding that the provision requiring payment of dues 12 months in advance was unlawful, as the record herein is inadequate with regard to this matter, and as determination of this issue would not, in any event, affect the remedy herein.

[24]As no exceptions were filed to the Trial Examiner's recommendation that backpay should be paid from March 30, 1956, this recommendation is adopted *pro forma.*

question sank, or the date on which he was offered reinstatement, whichever occurs sooner. As we have found that Seine and Line, by executing and enforcing the unlawful union-security contract, caused and attempted to cause the boatowners' discrimination against such employees by requiring as a condition of their continued employment that they join or pay support money to that Union, we shall hold the Respondent Union jointly and severally liable with the Respondent Employers for backpay until 5 days after it notifies the Employers, in writing, sending copies to the employees listed in Appendix A, that it withdraws its objections to their unconditional reinstatement.

Having found that ATC and its boatowner members have rendered unlawful assistance and support to Seine and Line, we shall order them to withdraw recognition from Seine and Line and to cease enforcing their contract with that Union. In addition, we shall set aside the certification of representatives issued conditionally to Seine and Line on October 20, 1958.[25]

The record shows that some of the discriminatorily discharged employees, although they were members of Local 33, later accepted employment on vessels of the ATC boatowners and, as a condition of retaining such employment had to pay dues or support money to Seine and Line. We find that all such employees who were previously members of Local 33 and not of Seine and Line, and either joined or paid support money to the latter Union, did so involuntarily because the contract required it as a condition of employment. We shall there-

[25]See *Kristi Gradis, et al., supra.*

fore provide that these employees be reimbursed, jointly and severally, by the Respondent Union and the Respondent Employers for all dues, initiation fees, assessments, and support money in lieu thereof, paid under these circumstances.[26] However, we shall not require the refund of sums paid to Seine and Line by other fishermen who were employed by these vessels after the Seine and Line contract was signed, who were previously members of Seine and Line and not of Local 33. The contract did not require, and the evidence does not show, that such employees joined Seine and Line for the purpose of obtaining these jobs. As such voluntary members are not shown to have been coerced into joining, remaining members of, or paying money to, Seine and Line, we find that the refund of such payments would not serve to dissipate the effects of the unfair labor practices found herein or effectuate the policies of the Act.[27]

ORDER

Upon the entire record in these cases, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that:

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[26]Our reimbursement order is not to be construed as requiring refund of a charge of one-half percent of each crewmember's share of the catch paid to Seine and Line, as this charge apparently was made in accordance with industry practice to compensate a union for services rendered employees in connection with the distribution of the proceeds of the catch, and not as an obligation of membership in that Union. We consider the Trial Examiner's recommendation that "other contributions" be refunded as too vague, and therefore do not adopt it.

[27]*Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al. (Mechanical Handling Systems)* v. *N.L.R.B.*, 365 U.S. 651.

A. The Respondent Employers, including the owners and masters of the vessels *Liberator, City of Los Angeles, Delores M., Sea King, Columbia, New Sea Rover, Western Fisher, Sea Scout, Arlene S., Golden West, Ronnie M., Defense,* and *Marsha Ann,* and American Tuna Committee, jointly and severally, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Recognizing Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, or any successor thereto, as the representative of any of their employees for the purpose of dealing with said organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until that organization shall have been recertified by the Board as the exclusive representative of such employees.

(b) Performing or giving effect to, or in any way enforcing, their 1956 contract with Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, or any modification, extension, supplement, or renewal thereof, or any other contract, agreement, or understanding entered into with it relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until that organization shall have been recertified by the Board as the exclusive representative of such employees.

(c) Discouraging membership in Fishermen's Union, Local 33, ILWU, or in any other labor organization, by

discharging or refusing to hire employees because they are members of that organization, or in any other manner discriminating against employees or prospective employees in regard to their hire or tenure of employment or any term or conditions of employment, except to the extent permitted by Section 8(a)(3) of the Act.

(d) Requiring their crewmembers as a condition of continued employment to join or pay dues or support money to Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO.

(e) Assisting or contributing support to Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, in any unlawful manner.

(f) In any other manner interfering with, restraining, or coercing their employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as permitted by Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Withdraw and withhold recognition from Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, as the representative of their employees unless and until that organization shall have been recertified by the Board as the exclusive representative of such employees.

(b) Severally offer to the crewmembers whose names appear on Appendix A immediate and full reinstatement on the vessels from which they were discharged, unless such vessels have sunk, without prejudice to their seniority or other rights and privileges.

(c) Jointly and severally with the Respondent Union reimburse crewmembers for all moneys illegally exacted from them as dues, initiation fees, assessments, or support money, on behalf of the Respondent Union since January 4, 1956, in the manner and to the extent set forth in the section of the Intermediate Report entitled "The Remedy" as modified in the section hereinabove entitled "The Remedy."

(d) Jointly and severally with the Respondent Union make whole all the employees listed in Appendix A, attached hereto, for any loss of pay suffered as a result of the discrimination against them from March 30, 1956, in the manner set forth in the section of the Intermediate Report entitled "The Remedy" as modified by the section hereinabove entitled "The Remedy."

(e) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all settlement sheets, payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze and determine the amount of backpay due, the sums illegally exacted, and the rights of the employees involved under the terms of this Order.

(f) Provide to each crewmember now employed a signed copy of the notice attached hereto marked "Ap-

pendix B",[28] and provide the Regional Director for the Twenty-first Region with signed copies of such notices for posting at the offices of Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, and Fishermen's Union, Local 33, ILWU.

(g) Provide to each crewmember now employed a copy of the notice attached hereto marked "Appendix C" signed by a representative of the Respondent Union.

(h) Severally notify the Regional Director for the Twenty-first Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

B. The Respondent Union, Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, San Pedro, California, its officers, representatives, agents, successors, and assigns, shall:

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[28]The Regional Director is instructed to insert, on separate copies of the attached notice, the names of the individual vessels in the heading and below the signature line, and, on the notices to be distributed by the *New Sea Rover, Defense, City of Los Angeles, Columbia, Sea Scout, Liberator, Delores M.*, and *Ronnie M.*, to insert the words, "We will offer the following employees immediate and full reinstatement without prejudice to their seniority or other rights and privileges:" followed by the names of the employees discriminatorily discharged from the vessel as shown in Appendix A.

In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

1. Cease and desist from:

(a) Causing or attempting to cause the Respondent Employers named above to discriminate against employees by imposing any requirement of membership in the Respondent Union or the payment of any moneys to it as a condition of employment, or to discriminate in any other manner regarding their hire or tenure of employment or any term or condition of employment, except to the extent permitted by Section 8(a)(3) of the Act.

(b) Performing, giving effect to, or in any way enforcing its 1956 contract with the Respondent Employers or to any modification, extension, supplement, or renewal thereof, or to any other contract, agreement, or understanding entered into with the Respondent Employers relating to grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment, unless and until it shall have been recertified by the Board as the exclusive representative of such employees.

(c) In any other manner restraining and coercing employees of the Respondent Employers in the exercise of their rights guaranteed by Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment, as authorized by Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act.

(a) Jointly and severally with American Tuna Committee and its boatowner members named above reimburse crewmembers of such boatowners for all moneys

illegally exacted from them as dues, initiation fees, assessments, or support money, from January 4, 1956, in the manner and to the extent set forth in the section of the Intermediate Report entitled "The Remedy," as modified in the section hereinabove entitled "The Remedy."

(b) Jointly and severally with the Respondent Employers named above make whole all crewmembers named in Appendix A for any loss of pay suffered as a result of the discrimination against them from March 30, 1956, in the manner set forth in the section of the Intermediate Report entitled "The Remedy," as modified by the section hereinabove entitled "The Remedy."

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all records necessary to determine which employees are entitled to reimbursement and the amounts thereof.

(d) Post at its offices, copies of the notice attached hereto marked "Appendix C" for signature by the Respondent Union. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent Union's representative, be posted immediately upon receipt thereof, and be maintained by the Respondent Union for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent Union to insure that such notices are not altered, defaced, or covered by any other material.

(e) Mail to the said Regional Director signed copies of the aforesaid notice for distribution to the Respondent Employers as provided above.

(f) Notify the Regional Director for the Twenty-first Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER ORDERED that the certification of representatives issued to Seine and Line Fishermen's Union of Los Angeles Harbor Area, Seafarers' International Union of North America, AFL-CIO, in "Unit E" on October 20, 1958, in *Krist Gradis, et al.*, Cases Nos. 21-RC-4452 and 21-RC-4631, be, and it hereby is, set aside.

IT IS FURTHER ORDERED that the complaint herein, insofar as it alleges that Lawrence Zuanich, John A. Zuanich and Constanta Zardeneta d/b/a MV *Stranger* violated the Act, be, and it hereby is, dismissed.

MEMBER FANNING concurring in part and dissenting in part:

I agree with the majority that the Respondent Employers violated Section 8(a)(1), (2), and (3) of the Act and Respondent Seine and Line violated Section 8(b)(1)(A) and (2) with respect to the execution and enforcement of their January 1956 contract.

I disagree, however, with the majority's further conclusion that the Respondent Employers further violated Section 8(a)(3) of the Act by notifying their fishermen employees that they would not be responsible for personal belongings left aboard after December 31, 1955. The facts with respect to this issue are fully set forth in the Intermediate Report. Briefly stated, there had been a number of contracts between Local 33 and the Respondent boatowners, the last of which expired on December

31, 1955. On December 27, 1955, the fishermen employees, all members of Local 33, were requested to remove their personal belongings from the boats before January 1, 1956. This action of the employers was the culmination of an economic dispute between the boatowners and Local 33 that had kept most of these boats inoperative from about July 1955, to December, when the contract was at an end. As the Trial Examiner found, continued employment of the Local 33 crews would have meant that the boatowners would have had to settle with their crews on the basis of prices substantially in excess of the actual market value of the catch. The boatowners were unwilling to fish on these terms. Local 33 would not agree to less. Adding to their dilemma was the fact that two unions, Local 33 and Respondent Seine and Line, controlled the entire source of competent fishermen. Both Unions, it should be noted, would fish only on the terms of an unlawful closed-shop contract, executed *before* fishermen were supplied. As the Trial Examiner recognized, the Respondent Employers had little freedom of choice in this case: "They could try to seek agreement with Local 33 and they had before October done so without success. They could offer the cannery price and take along any competent person who was willing to go. The second alternative was chimerical and probably was not even considered. Local 33 members would not fish without a contract; nor would members of Seine and Line." In these peculiar circumstances to hold, as the majority does, that the termination of Local 33 crewmembers was unlawful discrimination seems to me to go a step beyond the statutory proscription. Section 8(a)(3) forbids an employer to discriminate against his

employees to encourage or discourage union membership. The majority find that the boatowners discharged their employees "to avoid dealing with Local 33." Obviously, an employer, who is opposed to a union or unionism and discharges an employee to rid himself of an unwanted union has engaged in discrimination that discourages membership in that union. But the facts in this case do not, in my opinion, neatly fit that niche. Here the inference is at least equally valid that the Employers replaced their Local 33 crews because they found it impossible to meet the economic demands of the crews, voiced adamantly through Local 33. Indeed, as I read the record, these boatowners would have preferred continuing to contract with Local 33 if they had thought it economically possible to do so. Under all the circumstances, I question whether the General Counsel has proved by a preponderance of the evidence that the termination of these employees is conduct of the type proscribed by Section 8(a)(3). Accordingly, I would dismiss this allegation of the complaint.

CHAIRMAN MCCULLOCH and MEMBER RODGERS took no part in the consideration of the above Decision and Order.

APPENDIX C

Seine and Line Fishermen's Union of San Pedro, affiliated with Seafarers' International Union, AFL-CIO *and* Fishermen's Union, Local 33, Fishermen and Allied Workers' Division, International Longshoremen's and Warehousemen's Union *and* William J. Horner; Anton Misetich; John Sestich; Giovanni Santo; Phil Crachiolo; Nick Gargas; Frank Amalfitano; Sal Manzella; Steve Gargas; John Zorotovich; Vincent Budrovich; Sal Genovese; Joseph A. Ferrante; Bernard Mattera; Frank Coscetti; John Stanovich; Joe Cardinale; Paul Biazevich; A. E. Lucido; Antonio Pisano; John Vilicich; Isadore Califano; Nick Marincovich; John Mardesich; Gaetano Scotti; John Ryono; Ralph Galante; Karou Suzuki; Andrea Spinoza; John Misetich; Jack Russo; Salvatore Castaldi; G. C. di Meglio; Pasquale Artiano; Frank Iacono; Anthony di Leva; Antonio d'Ambra; Liberato Aversano; Antonio di Bernardo; Peter Guarrasi; John Sima; Aniello Pilato; Andrew Rafkin, Jr.; Joe Califano; A. di Leva; Dominic Rocky; Anthony Pisano; Louis di Meglio; Ben Fukuzaki; Lawrence Zuanich; Carmen di Massa; John Scognamillo; Norman Mezin; Yutaka Yoshimoto; John Vilicich; Santo Trama; W. H. Gillette; Robert L. Williams; Frank Iacono; Joe Randazzo; Mike Trama; Robert F. Lamprecht; Guiseppe Russo; Don Kusar; John Alioto; Joe T. Lauro; W. C. Smith; Pasquale Lauro; John di Meglio; Tony Mattera; N. Wolf; John J. Guglielmo; John Vilicich; Alfredo Valtino; Tom Trama; W. E. Duggan; Don R. Marvin; Joe Barber, Jr.; Frank Trama; Tom Nishida; and Amos Hashimoto, Parties to the Contract. *Case No. 21-CB-879. March 2, 1962*

DECISION AND ORDER

On February 12, 1960, Trial Examiner Wallace E. Royster issued his Intermediate Report in the above-entitled case, finding that the Respondent Union had engaged in and was engaging in certain unfair labor practices and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the Intermediate Report attached hereto.[1] Thereafter the Respondent Union and the General Counsel filed exceptions to the Intermediate Report and supporting briefs.

The Board has reviewed the ruling of the Trial Examiner made at the hearing and finds that no prejudicial error was committed.[2] The Board has considered the entire record in this case, including the Intermediate Report, the exceptions, and the briefs, and hereby adopts

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[1]This case was heard together with *Paul Biazevich,* 21-CA-2388, and related cases, in which the Trial Examiner issued a separate Intermediate Report. See 136 NLRB 13.

[2]The Respondent Union moved to dismiss the complaint on the following grounds: (1) Delay in issuing the complaint and in proceeding with the hearing. For the reasons given in *Paul Biazevich, et al.,* 136 NLRB 13, footnote 2, we find no merit in this contention. (2) Failure of the Trial Examiner to confine his findings of violations to the period from September 15, 1956, the beginning of the 10(b) period, to July 17, 1957, the date of issuance of the complaint. The record does not indicate, however, that the violations found ceased on the latter date. In any event, even if they did, the Board would retain jurisdiction to issue a cease and desist order herein. See *Consolidated Forwarding Company, Inc.,* 112 NLRB 357, footnote 2. (3) The fact that the Trial Examiner based his findings, in part, on his observation of the witnesses inasmuch as no witnesses testified in this case. Although this language was inapplicable, we find that this apparent inadvertence was not prejudicial. Accordingly, the motion to dismiss the complaint on these grounds is hereby denied.

the findings, conclusions, and recommendations of the Trial Examiner excepted as modified below:

1. The complaint alleges, and the Respondent Union admits, that it was a party to a union-security contract with the boatowners[3] named in the complaint. The Trial Examiner found the contract, executed in 1956, unlawful in various respects, as discussed below, and ordered the Respondent Union, *inter alia,* to cease and desist from enforcing the union-security provisions thereof with those boatowners whose individual operations meet the Board's jurisdictional standards. The General Counsel excepts to the refusal of the Trial Examiner to assert jurisdiction over the operations of all the boatowners listed below. We find merit in this exception.

In its Decision, Order, and Direction of Elections in *Krist Gradis, supra,* the Board found, on the basis of the entire bargaining history, including the 1956 contract here in issue, that approximately this same group of boatowners participated in group bargaining through the Fishermen's Cooperative Association, herein called the Co-op, with the Respondent Union, and that these boatowners therefore constituted a single employer for jurisdictional purposes. The Board accordingly asserted jurisdiction on the basis of the combined outflow of the boatowners as a group.

None of the boatowners appeared at the hearing herein, although served with notice. The General Counsel stated on the record in this case that jurisdiction over boats

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[3]We find that the boatowners and masters involved herein are employers within the meaning of the Act. *Krist Gradis, et al.,* 121 NLRB 601, footnote 33.

which individually failed to meet the Board's jurisdictional standards would depend on whether, as members of the Co-op, they constituted a single employer for jurisdictional purposes, which was a primary issue in *Krist Gradis, supra,* and would be decided by the Board in that case; and that he had refrained from offering such evidence in this case because an initial determination by the Trial Examiner would not be helpful to the Board on jurisdiction. The Respondent Union made no objection at the hearing to the General Counsel's announced method of procedure, and made no contention at the hearing or since then that the jurisdiction issue should have been relitigated in this proceeding, or that the facts are otherwise than as presented in *Krist Gradis.*

The Trial Examiner made no reference to the positions of the parties stated above. While he did refer to the Board's assertion of jurisdiction in *Krist Gradis,* he nevertheless recommended dismissal of the complaint as to the contracts with all boatowners which individually failed to meet the jurisdictional standards on the ground that "nowhere in this record is there evidence to support a finding that the contracts in issue were arrived at through multiemployer bargaining." The General Counsel contends in his exceptions that the Trial Examiner was obliged to take official notice of, and to follow, the Board's jurisdictional determination in *Krist Gradis.* We agree. On the basis of the Board's findings in the *Krist Gradis* case,[4] and for the reasons given therein, we shall,

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[4]See *Pittsburgh Plate Glass Company* v. *N.L.R.B.,* 313 U.S. 146; *N.L.R.B.* v. *Moss Amber Mfg. Company,* 264 F. 2d 107 (C.A. 9); *M. L. Townsend,* 81 NLRB 739, enfd. 185 F. 2d 378 (C.A. 9); *Fishermen's Cooperative Association, et al.,* 128 NLRB

as requested by the General Counsel,[5] assert jurisdiction over the following individual boats, and boats whose owners or masters were members of the Co-op—Seine and Line multiemployer unit:[6]

A. A. Ferrante
American Venture
Anthony M.
Bella Marie
California
City of Naples
Dor Ann
E. S. Lucido
Endeavor (Small)
Endeavor (Large)
Gaviota
Gigi
Josie Lena (Russo Bros.)
Lucy Ann
Mercury
New San Antonio
Nyna Rose
Nyna Rose II
Patriotic
Ralphy Boy
Redeemer
S. G. Guiseppe
S. Teresa
Saint Rita
San Antonio IV
San Silverio

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62. See also *Plant City Welding and Tank Company*, 123 NLRB 1146, 1156, where the Board stated, "It is well established that the Board may take official notice of its own proceedings and decisions, and rely thereon, including the use in an unfair labor practice case of evidence adduced in a prior representation case, especially where, as here, the evidence was submitted on the identical issue and the same parties were present and participated."

[5]We shall not, as requested by the General Counsel, assert jurisdiction over the *S. Restituta II*, owned by Salvatore Castaldi. This vessel was not in the multiemployer unit found appropriate in *Krist Gradis*, and there is no commerce data in the record on its operations.

[6]Although the names and/or ownership of some of the vessels listed below and in Appendix A, attached hereto, may have changed since the hearing herein, the names are listed as they appear in the record in this case.

Santa Rita	Sea Maid
Santa Maria	Stella Maris
Santa Teresa	Sunbeam
St. Aniello II	Tommy Boy
St. Augustine II	Twin Brother (Robert M.)
St. Christina	Two Brothers (City of Pacific Grove)
St. Christopher	Vittoria
St. George II	Windward
St. Lucia II	

2. Seine and Line admittedly was a party to its 1956 contract with the owners or masters of the above-named boats, which contract required, as a condition of employment, that all employees join and pay dues, or pay support money the equivalent of dues, to Seine and Line without allowing the statutory 30-day grace period; the payment of unspecified nonperiodic assessments; involuntary checkoff of such dues, support money, and assessments; and forfeiture of earnings by those not discharged for failure to pay amounts due to Seine and Line. We find, therefore, in substantial agreement with the Trial Examiner, and for the reasons fully set forth in *Paul Biazevich, supra,*[7] that Seine and Line thereby violated Section 8(b)(1)(A) and (2) of the Act.[8]

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[7]The union-security provisions of the contract involved herein are identical with those of the contract involved in *Paul Biazevich, supra,* with which this case was heard.

[8]As the record contains no evidence as to the enforcement of the union-security provisions found unlawful herein, we shall not adopt that portion of the Trial Examiner's recommended order requiring reimbursement of moneys unlawfully exacted.

ORDER

Upon the entire record in this case, and pursuant to Section 10(c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the Respondent, Seine and Line Fishermen's Union of San Pedro, affiliated with Seafarers' International Union, AFL-CIO, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining, performing, or enforcing the union-security and checkoff provisions of its 1956 contract with any of the above-named boats, their owners, masters, officers, agents, successors, or assigns, or any other employer over whom the Board will assert jurisdiction.

(b) Attempting to cause such employers to discriminate against employees in violation of Section 8(a)(3) of the Act.

(c) In any other manner restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by a lawful agreement requiring membership in a labor organization as a condition of employment, as authorized in Section 8(a)(3) of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Post at its offices, copies of the notice attached hereto marked "Appendix."[9] Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent's representative, be posted immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(b) Mail to the Regional Director for the Twenty-first Region, copies of the aforesaid notice for posting by the employers listed above for the same 60-day period. Copies of said notice, to be furnished by the Regional Director for the Twenty-first Region, shall, after being duly signed by the Respondent's representative, be forthwith returned to the said Regional Director for such posting.

(c) Notify the Regional Director for the Twenty-first Region, in writing, within 10 days from the date of this Order, what steps have been taken to comply herewith.

CHAIRMAN MCCULLOCH and MEMBER RODGERS took no part in the consideration of the above Decision and Order.

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[9]In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX D

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

UNFAIR LABOR PRACTICES

SEC. 8(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, * * * *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization * * * (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uni-

formly required as a condition of acquiring or retaining membership;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 464

PAUL BIAZEVICH, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A 1-16) is reported at 374 F. 2d 974. The Board's decisions and orders are reported at 136 NLRB 13 and 136 NLRB 1 (Pet. Apps. B and C).

JURISDICTION

The decision of the court of appeals was issued on January 6, 1967, and a petition for rehearing was

denied on May 9, 1967 (Pet. 3). The petition for a writ of certiorari was filed on August 7, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner boat owners violated Section 8(a)(3) of the National Labor Relations Act by discharging their crews in order to avoid dealing with a disfavored union.

2. Whether the court of appeals properly found that petitioners were not prejudiced by the Trial Examiner's revocation of subpoenas served on Board employees, and by his refusal to examine certain memoranda to determine whether they should be made available to petitioners for purposes of cross-examination.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act are set out in Appendix D of the petition.

STATEMENT

A. The Unfair Labor Practices Found By The Board

Petitioner boat owners operate fishing vessels in Southern California. In 1955, the fishermen on these vessels were represented by Fisherman's Union, Local 33, ILWU ("Local 33"). Under the collective bargaining agreement the crew's wages consisted of a specified share of the gross proceeds of the catch

(R. 719; G.C. Ex. 33-34, Tr. 1979, 2001).[1] However, if the price paid for the fish fell below levels specified by the agreement, the crew was to receive a minimum guarantee per ton (R. 719; G.C. Ex. 33-34, Tr. 1979, 2001, 2132-2143). In 1955, tuna prices declined to a level where the minimum-guarantee provisions of the contract became operative. In April 1955, at the boat owners' request, Local 33 induced the fishermen to accept payment on a straight percentage basis without any guarantee and, in June, Local 33 induced the crew to accept another reduction in wages. (R. 984, 714; G.C. Ex. 34, 35, 38, 42, Tr. 2010, 2096, 2130-2143). Thereafter, the crews refused to accept any further cut in wages, which were already substantially lower than those to which they were contractually entitled (R. 984; G.C. Ex. 45, 46, Tr. 494-495, 2096, 3539-3542). The masters elected not to fish for tuna on a minimum guarantee basis, and laid up their vessels (R. 719; Tr. 203-204, 146, 2928, 3403-3404, 3577-3578).

Other vessels, represented by petitioner Seine & Line Fisherman's Union of Los Angeles Harbor, Seafarers' International Union of North America, AFL-CIO ("Seine & Line") continued to fish, however, as Seine & Line had agreed to accept payment on a straight percentage basis (R. 720; Tr. 3668). Accordingly, beginning in August 1955, petitioner boat owners began to inform their crews, most of whom

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[1] "R." refers to Vol. I of the record certified by the court of appeals. The remaining references are to the transcript of testimony and the exhibits in the other Volumes of the certified record.

were Local 33 adherents (G.C. Ex. 69, Tr. 2387), that at the end of 1955 when they could terminate their contract with Local 33 they intended to bargain with Seine & Line and to employ only fishermen who were members of or cleared by Seine & Line.[2]

In mid-October 1955, the boat owners, who had previously bargained with Local 33 through the Fisherman's Cooperative Association, formed the American Tuna Committee ("ATC") to represent them in future bargaining negotiations and agreed not to deal separately with Local 33 (R. 720; G.C. Ex. 47, 68C, 68D, Tr. 2096, 2292, 2521-2535, 2672-2682, 2726, 2906-2908, 2941-2942, 2947-2956). About October 27, the boat owners notified Local 33 of their desire to terminate the existing agreement on December 31. In early November, Local 33 offered to accept a minimum guarantee which was the same as the crew members would receive on a straight percentage basis, provided that the vessels began to unload within 10 days after arrival at the dock (R. 984; Tr. 2009, 2215, 2572, G.C. Ex. 50). The boat owners, through the Fishermen's Cooperative Association rejected this proposal, and

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[2] *Arlene S.* (Tr. 748-749, 981-982; Tr. 1738-1739, 1736, 1747-1751); *Sea King.* (R. 981-982, 983, n. 13, 740-742; Tr. 749, 776-777, 1000-1001, 1005-1007, 1015-1019, 1027-1029, 3575-3576); *Golden West.* (R. 731, 733, 749; Tr. 1578-1582, 1564, 1868-1869); *Sea Scout.* (R. 981-983, n. 13, 738-739; Tr. 359-360, 378-379, 423, 439-440, 473, 660, 668, 422-423, 470-471, 477, 4869-4870); *Defense.* (R. 981-982, 983, n. 13, 729-731; Tr. 126, 133, 229-230, 298-300, 643, 685-686, 1298, 1877); *Columbia.* (R. 981-982, 983, n. 13; Tr. 560-562, 582, 598); *City of Los Angeles.* (R. 981-982, 734-735; Tr. 1387-1388, 1472-1473, 1898-1901, 2321-2323, 2336-2337).

made no effort to pursue the matter further (R. 984; G.C. Ex. 50, Tr. 2009). On December 15, Local 33 wrote to ATC's counsel protesting that the contract terminations were not effective and requesting a meeting to discuss the terminations and contract negotiations (R. 720; G.C. Ex. 52, Tr. 2037). ATC's reply ignored the request for a meeting and expressed doubt as to "the right of your organization to bargain for these crews" (R. 720; G.C. Ex. 54, Tr. 2085). On December 23, Local 33 again requested a meeting and pointed out that it had been customary for the boat owners to rehire substantially all of the crew members employed during the preceding season. It stated that it was prepared to submit proof that practically all of these crew members wanted Local 33 to represent them (R. 720; G.C. Ex. 54, Tr. 2085).[3]

Once hired by one of petitioner boat owners, a crew member, if he heard nothing to the contrary from the master, expected to continue to work aboard the same vessel (R. 721; Tr. 4010, 2641-2642, 927-928, 938-939, 3099-3102, 3457, 3546, 2568-2569, 397-398, 1833, 837, 713, 938, 1087, 1998, S. Tr. 2487, G.C. Ex. 9-22). Most of the crew members followed the practice of leaving on the boat, between voyages, clean cloth-

[3] On December 27, 1955, Local 33 began to picket the vessels involved to protest the boat owners' action in terminating the agreements as they existed in 1955, and in withdrawing recognition from Local 33 as the representative to bargain for new agreements (R. 985-986, 720; G.C. Ex. 56, 59, 60; Tr. 2101, 2039-2046, 2085). This picketing continued until early January 1956, when it was enjoined by a State court (R. 720; Tr. 2047, 2079, 2590).

ing and other gear of modest value, which were useful only during fishing trips (R. 722; Tr. 3209, 3360, 400, 123-124, 1070, 1077-1078, 2585-2587, 3099-3100, 3964, 936-937, 1595, 875-876, 311-313, 437, 1551-1552, 839, 638-639, 680, 1040-1041, 1111-1112, 1306, 801, 2909-2911, 530, 1145). Prior to December 29, 1955, petitioner boat owners sent virtually identical letters (the "clothes letters") to practically all the members of their 1955 crews, telling them to remove their personal belongings from the boats. These letters were intended by the boat owners, and interpreted by the crew members, to constitute discharges. (R. 983-984, 722-723; Tr. 2537, 2590-2592, 2600, 2777-2778, 3074-3075, 3157-3160, 3257-3258, 3299-3300, 3403, 3653-3654, 3823, 3962-3964, 128-130, 233, 316-317, 360, 403, 424-425, 440, 476, 502-503, 531-532, 563-564, 607-608, 643, 661-662, 689, 706, 771-772, 786-787, 810, 841-842, 878-879, 916-917, 971-972, 1071-1072, 1086-1087, 1105, 1153, 1195, 1239, 1273, 1299-1300, 1305, 1329-1330, 1371-1372, 1389, 1418-1419, 1481, 1507, 1529-1530, 1617-1618, 1842, 1851-1852, 1875-1876, 1897-1898, 1946-1947, 2299-2301, 2323-2324.)

Immediately after mailing these letters, Skipper John Zorotovich of the *Defense*, one of the vessels involved, telephoned his old crew members and told them that he could not "work by" Local 33's contract, but that, if they could join Seine & Line, "we could still go fishing as a group" (R. 982, n. 11, 730; Tr. 3411-3412). Similarly, when several members of the *City of Los Angeles* crew went down to the boat to

pick up their belongings, boat owner Nick Gargas told them that, if they would "go in" Seine & Line, "then [they] can stay in the boat" (R. 735; Tr. 1898-1899).

Toward the end of 1955, the boat owners began to hire almost completely new crews to sail in 1956 (R. 723, 739; Tr. 3162-3163, 3194-3199, 3263-3265, 3458-3460, 3553-3554, 3623-3632, 3973-3977). Andrew Vilicich, then owner of the *Marsha Ann*, instructed the skipper of that boat not to hire even the best members of the 1955 crew because Vilicich "didn't want no one from Local 33" (R. 732-733; Tr. 1585-1586). On January 3, 1956, some of the boat owners met with their ATC counsel and a Seine & Line representative (R. 724; Tr. 3965-3966). On January 4, the boat owners signed collective agreements with Seine & Line which included, *inter alia*, union security and checkoff provisions (R. 988, 724; G.C. Ex. 66, Secs. II, IX).

On the basis of the foregoing facts, the Board found that petitioner boat owners violated Section 8(a)(3) of the Act by discharging 52 members of their 1955 crews in order to avoid dealing with Local 33 (Pet. App. B 10).[4]

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[4] The Board also found that petitioner boat owners interfered with, restrained and coerced their employees, in violation of Section 8(a)(1) of the Act, by telling employees on various occasions during the fall and winter of 1955 that they could continue to work after the end of the year only if they joined Seine & Line, and that otherwise they would be replaced (Pet. App. B 9-10). In addition, the Board found that petitioner boat owners violated Section 8(a)(1), (2), and (3) of the Act, and that Seine & Line violated Section 8(b)(1)(A) and (2), by entering into and enforcing a union-security

The Board's order, *inter alia*, requires petitioner boat owners to reinstate the discriminatorily discharged employees, and to withdraw recognition from and cease giving effect to their contract with Seine & Line. The order further requires the boat owners, jointly and severally with Seine & Line, to make the crew members whole for any loss of pay suffered as a result of the unfair labor practices, and to reimburse them for all moneys exacted from them under the illegal union-security provisions of the contract. (Pet. App. B 23-29.)

B. The Procedural Issue and the Board's Ruling Thereon

The Board hearing in the instant case began on August 5, 1957. At that time the Board's rules and regulations prohibited all agency employees from producing any documents, reports, memoranda, or records of the Board, within the General Counsel's control, without the General Counsel's written consent. The Board interpreted this rule as limiting the right

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contract at a time when Seine & Line was not the statutory representative of the employees, and which contained provisions unlawful on their face in that they (1) failed to allow non-members the 30-day grace period for joining the union afforded by the statute; (2) required employees to pay assessments as well as initiation fees and dues; (3) required employees to execute checkoff authorizations; and (4) called for forfeiture of earnings by all employees who failed to pay Seine & Line the amounts described above (Pet. App. B 18-20). Finally, the Board found that Seine & Line further violated Section 8(b)(1)(A) and (2) of the Act by entering into an unlawful union-security contract with other employers (Pet. App. C 6). Petitioners do not here contest these additional findings.

of its attorneys and field examiners to produce statements made by the General Counsel's witnesses during pre-trial investigations. *The Great Atlantic and Pacific Tea Company*, 118 NLRB 1280. Accordingly, at the original hearing the Trial Examiner upheld the refusal of the attorney for the General Counsel to comply with petitioners' demand for the production of such statements (R. 979). The hearing closed on July 9, 1958.

On August 28, 1958, the Board held that the foregoing rule was invalid to the extent that it foreclosed production of such statements for purposes of cross-examination. *Ra-Rich Manufacturing Corp.*, 121 NLRB 700 (R. 634-635).[5] Accordingly, on September 8, 1958, the Trial Examiner issued an order reversing any ruling made at the hearing which denied the request of any petitioner for production of pre-trial statements within the purview of *Ra-Rich*, requiring the General Counsel to make such pre-trial statements available to any petitioner forthwith, and

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[5] In accordance with this decision, the Board rule barring agency employees from producing documents under the General Counsel's control, without his consent, was amended to read (29 C.F.R. 102.118):

> * * *: *Provided,* After a witness called by the general counsel has testified in a hearing upon a complaint under section 10(c) of the act, the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken: * * *.

permitting any petitioner to move to reopen the hearing for the limited purpose of further examining any witness whose pre-trial statements were within the scope of his order (R. 979; 632-635, 637). Pursuant to the Trial Examiner's ruling, the General Counsel furnished to petitioners all the pre-trial statements which were in his possession (with the one exception, discussed below).

Thereafter, the hearing was re-opened and 58 of the original 71 witnesses returned and were cross-examined on the basis of their pre-trial statements. Thirteen witnesses, whose statements had been furnished to petitioners, did not appear at the re-opened hearing. Their testimony was stricken from the record by the Board. (Pet. App. B 7).

Approximately 10 witnesses at the re-opened hearing testified to the existence of statements which were not produced. In response to inquiries made by petitioners' counsel, the attorney for the General Counsel repeatedly stated that he had searched his files and had no statements of any kind from these witnesses. (Tr. 4372, 4462-4463, 4689, 4712-4713, 4887.) He did disclose that in his search he had discovered two notebooks containing handwritten notes of a deceased field examiner ("the Filter memoranda") (Tr. 4712-4713). Petitioners' counsel requested the Trial Examiner to direct the attorney for the General Counsel to produce the Filter memoranda. The Examiner refused this request, and revoked *subpoenas duces tecum* and *ad testificandum* which had been served on representatives of the General Counsel relative to the

other alleged statements which had not been produced (Tr. 4826-4837, 5045, ATC Exh. 41-44). The Board sustained the Examiner's rulings, noting, with specific reference to the Filter memoranda, that "[n]one of these notes were signed or authenticated by witnesses" (Pet. App. B 8, n. 8), as required by the Board's rule (n. 5, *supra*).

C. The Decision of the Court of Appeals

The court of appeals found that the Board's unfair labor practice findings were supported by substantial evidence (Pet. App. A 5). Respecting the procedural issues, the court concluded that, although the Trial Examiner had erred in revoking the subpoenas and in refusing to examine the Filter memoranda to determine whether they should be produced, these errors were not prejudicial to petitioners (Pet. App. A 5-15). Accordingly, the court enforced the Board's orders in full (Pet. App. A 16).

ARGUMENT

Since the opinion of the court of appeals is correct and there is no conflict in the circuits, there is no occasion for further review.

1. The substantive issue petitioners seek to raise—whether the boat owners were privileged to lockout their employees in order to avoid "serious economic consequences" (Pet. 37)—is not presented here. The Board found, and the court below sustained its findings, that petitioner boat owners did not merely temporarily layoff their crew members but actually dis-

charged them and that the reason for that action was to replace Local 33 with Seine & Line. Petitioners' challenge to these findings raises only a substantial evidence issue, which does not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491.

In any event, substantial evidence supports the Board rejection of petitioners' contention that the discharges were made solely because the economic demands of Local 33 were impossible to meet. As the Board pointed out (Pet. App. B 13-14):

> contrary to the contention that the Local 33 demands were so inflexible that it was impossible for the boatowners to deal with that Union, the record shows that, even though Local 33 had a written collective-bargaining agreement with the boatowners covering the year 1955, Local 33 agreed on three occasions during the first 7 months of 1955 to modify that agreement to provide for progressive reductions in the rate of pay to crewmembers because of the falling price of tuna. When the price fell for the fourth time that year, the Union attempted to hold the line but, after the boatowners had refused for about 3 months to operate under the terms of the agreement, Local 33 gave in and offered to modify the written contract in certain respects, including acceptance of payment based on the market price of tuna. The boatowners, however, failed to pursue this offer of Local 33 to further modify the 1955 agreement. Thereafter, they avoided all efforts made by Local 33 to negotiate a new agreement for 1956, and, instead,

precipitately entered into a contract with Seine & Line, in which they agreed to pay the same rate which Local 33 had previously offered to accept.

Nor are petitioners aided by *American Ship Building Co.* v. *National Labor Relations Board*, 380 U.S. 300. There the Court sanctioned a lockout in support of the employer's bargaining demands; it did not countenance such drastic action as a discharge of employees designed to oust their bargaining agent altogether. Indeed, in *American Ship*, the Court carefully distinguished the bargaining lockout there involved—"the purpose and effect of [which] were only to bring pressure upon the union to modify its demands"—from a situation where the employer "locked out only union members, or locked out * * * employee[s] simply because [they were] union member[s] * * * [or] conditioned rehiring upon resignation from the union." 380 U.S. at 312.

2. Similarly, no issue warranting further review is presented by the court of appeals' disposition of petitioners' procedural objections. Concerning the Filter memoranda, the court below agreed with petitioners that the Trial Examiner erred in refusing to examine those notes *in camera*. But petitioners would have been entitled to obtain those notes only if they contained a substantially verbatim account of the testimony of one or more of the witnesses, and the court properly found that petitioners had failed to make that showing. As the court pointed out (Pet. App. A 14):

> Before we would be able to determine whether any of Filter's notes are the type of verbatim accounts which should have been turned over for use in cross-examination, we would need an opportunity to personally examine them. But the Filter memoranda have not been made a part of the record herein. "If petitioners wished review of the trial examiner's determination as to the nature of the report, it was incumbent upon them to see that a record was presented upon which review could be had, by requesting that the memorandum be submitted to the court under seal." [Quoting *Harvey Aluminum, Inc.* v. *National Labor Relations Board*, 335 F. 2d 749, 756 (C.A. 9).]

The holding of the court of appeals is in accord with *Palmer* v. *Hoffman*, 318 U.S. 109, 116, where this Court approved a similar requirement. See also *United States* v. *Ebeling*, 146 F. 2d 254, 256, 257 (C.A. 2).[6]

The court of appeals was likewise justified in concluding that petitioners were not prejudiced by the Trial Examiner's quashing of the subpoenas which had been served on representatives of the General Counsel seeking the production of additional pre-trial statements from ten witnesses. As the court below stated (Pet. App. A 7), "the attorneys for the gen-

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[6] Nor is it material that the court below may have declined, during oral argument, the opportunity to inspect "a portion of the statements" (Pet. 28). A proffer at oral argument of only a *part* of the material in issue is not an adequate substitute for having *all* of the relevant material incorporated in the record and formally certified to the court of appeals.

eral counsel and for the charging party, in response to questioning by counsel for respondents, repeatedly stated that they had thoroughly searched their records and had been unable to find any statements other than those which they had already handed over." Petitioners' contention that they nonetheless were prejudiced rests on the erroneous premise that "the attorney for the General Counsel admittedly limited his search to 'signed statements' " (Pet. 26). But the record shows that his search was not so liimted. Thus, counsel for the General Counsel stated (Tr. 4713):

> * * * I went through all the Biazevich file[s], all the Christ Granich files, and all of the files * * * [of] several other smaller miscellaneous fishing cases where there is a possibility that there might have been some statement mislaid, and I found no statement, either signed or prepared for signature of any witness which was called, other than those which I have furnished.[7]

In view of the foregoing, there is no merit to petitioners' contention (Pet. 30-33) that the court of appeals applied a novel and unduly burdensome test of prejudice in this case. Nor is there a conflict of decisions; the cases cited by petitioners (Pet. 27-29) clearly involve different factual situations.

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[7] The transcript references cited by petitioners (Pet. 30) do not establish the contrary. Three reveal (see Tr. 4713, 5098, 5122) that the only unsigned statements which counsel for the General Counsel discovered were the Filter memoranda, discussed *supra*. The fourth reference (Tr. 4788) involves a response to a request for a specific *signed* statement.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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